CORPORATE CRIMINAL LIABILITY FOR MANSLAUGHTER

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ABSTRACT

In the late 1980s, a series of disasters was witness in the United Kingdom, such as the King's Cross Underground fire, the Piper Alpha disaster, the Clapham Junction Railway accident and the capsize of the ferry "Herald of Free Enterprise" at Zeebrugge. Although the following inquiries and reports highly criticised corporations for their poor management and organisation relevant to the risk of harm inherent in their activities, very few prosecutions for manslaughter have followed. Since the occurrence of these disasters, however, an increasing perception that deaths caused through corporate operations should comprise a category of corporate manslaughter has gradually become embedded in the public mind, and the publication on March 1996 of the Law Commission Paper dealing with corporate killing has brought about legal debates concerning how to hold corporations criminally liable for manslaughter. In addressing these legal issues, this thesis first traces the historical development of corporate criminal liability in English law and examines the current status of corporate liability for manslaughter. Then, it indicates practical and theoretical flaws from which most existing theories for corporate manslaughter suffer, and propounds a new theory of corporate liability for manslaughter by which both corporate and individual offenders can be held liable under the same conditions. Finally, it considers corporate defences and sentencing factors in the context of corporate manslaughter.

AUTHOR'S DECLARATION

I declare that the work in this dissertation was carried out in accordance with the Regulations of the University of Bristol. The work is original except where indicated by special reference in the text and no part of the dissertation has been submitted for any other degree. Any views expressed in the dissertation are those of the author and in no way represent those of the University of Bristol. The dissertation has not been presented to any other University for examination either in the United Kingdom or overseas.

SIGNED: Masayuki Sugawara DATE: 11/10/1999

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CHAPTER 1
INTRODUCTION

In the late 1980s, a series of disasters took place in Britain. On 18 November 1987, a catastrophic fire was caused by people smoking on the escalator in the Underground as they prepared to leave the King's Cross station. An official inquiry,[1] conducted by Mr. Fennnell, revealed that the fire, which started at about 19:25 in the escalator, was carried up to other sites nearer the top and, then, transformed into a flashover. Five minutes later, the alarm was raised by a passenger and one of the station staff, who had received no fire training, went to inspect the area. Unfortunately he informed neither the line controller nor the station manager. By chance two police officers were present and one of them ran to surface to call the London Fire Brigade. However, because they neither knew the geography of the station nor anticipated the flashover of the fire, their subsequent evacuation activities proved unsuccessful. By the time the London Fire Brigade reached the station it was too late to do anything. No single drop of water was applied to the fire that erupted into the tube lines ticket hall, killing 31 people. In his report, Mr. Fennell criticised London Underground for having failed to guard against the unpredictability of the fire, have effective systems to train staff in the fire drill, establish good communication systems for necessary evacuation, and organise a hierarchical system of responsibility for safety.

Within a year, on 6 July 1988, the Piper Alpha disaster took place abroad the North Sea oil platform, claiming the lives of 165 of the 226 persons on board and two of the crew of the fast rescue craft (FRC) of the Sandhaven during their rescue activities. At about 22.00 hours there was an initial explosion on the production deck which led immediately to a large crude oil fire in B Module of Piper Alpha. Due to oil from the platform and a leak from the main oil line to the shore, the fire rapidly extended into C Module and caused a number of other explosions on Piper Alpha. The intense fire and explosions destroyed the FRC of the Sandhaven, killed most of its occupants, and caused the structural collapse of large sections of Piper Alpha. The subsequent public

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[1] Department of Transport, *Investigation into the King's Cross Underground Fire* (1988, HMSO, London, Cm 499).

inquiry conducted by Lord Cullen[2] revealed that the immediate cause of the disaster was a failure in the permit to work system which caused communication errors between the day shift and the night shift. This led night shift personnel to restart one of the condensate injection pumps which had been shut down for replacement of a pressure safety valve taken off during maintenance. Their lack of awareness of the removal of the valve resulted in the leakage of gas from a blank flange assembly which had been fitted at the site of the valve and was not made leak-tight at the material time. However, a series of errors and faults on the part of the owners of the platform (Occidental Petroleum) were criticised in the Cullen report as contributing to the overall scale of the disaster. A number of emergency systems on the platform failed immediately or within a short period of the initial explosion: in particular, the fire-water system was rendered inoperative either due to physical damage or loss of power. Occidental management were not fully aware of the need for a high standard of the assessment of the risk of major hazards inherent in oil and gas production. Neither did they provide for appropriate emergency training for evacuation and fire-fighting as they intended: the safety policies and procedures were in place, but the practice was deficient.

Then on 12 December 1988, the Clapham rail crash claimed 35 deaths and caused nearly 500 injuries when a crowed commuter train ran head-on into the rear of another train, which was stationary in a cutting just south of Clapham station, and then struck a third oncoming train. A public inquiry conducted by Mr. Hidden[3] revealed that the immediate cause of the tragedy was the signalling system which failed at a critical time. Before the accident, alternations had been made to the signalling system (at the weekend) and an old wire should have been removed. Owing to an error it was still in the system and was making an electrical contact with its circuit. As a result, the old wire fed current into the new circuit and prevented the signal from turning red. In relation to this immediate cause, British Rail was severely criticised in Mr. Hidden's report for several reasons: there was no proper system of allocating meaningful descriptions to

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2 Department of Energy, *The Public Inquiry into the Piper Alpha Disaster* (1990, HMSO, London, Cm 1310). For a discussion of this disastrous case, see, for example, K. Miller, "Piper Alpha and the Cullen Report" (1991) 20 *Industrial Law Journal* 176.

3 Department of Transport, *Investigation into the Clapham Junction Railway Accident* (1989, HMSO, London, Cm 820).

particular staff concerning their duties, no effective system of communicating to the workforce the proper standards required of installation and testing work, no effective planning of the weekend work to prevent individuals working excessive overtime or to ensure sufficient numbers of appropriately qualified staff were available to match the particular weekend's workload, and the like.[4]

Common to these disastrous incidents are two facts that should be emphasised here. Firstly, although having successfully identified *human* errors made at the material time as the immediate causes of the disasters, the subsequent inquiries and reports were highly critical of prior corporate management and organisation relevant to the risk of harm inherent in business activities. In particular, the failures on the part of the corporations to have or effectuate proper systems for detecting the risk, training or supervision of staff, and communicating information in relation to particular operations were considered to contribute to the overall scale of disasters. Consequently, a series of these disasters drew increasing public attention that corporations should be held liable for deaths of victims.

Secondly, despite the public inquiries' strong criticisms of the relevant corporate risk-averting systems, the corporations were not prosecuted for manslaughter. Several reasons for this have been indicated by commentators: conceptual difficulties that the phenomenon of corporate harms were not perceived as crimes because they did not fit the socially constructed image of criminal behaviour;[5] failure of the legal system to respond to the cultural shift towards blaming corporations for technical hazard that threatened people's safety;[6] and the fact that, in cases of occupational hazards, prosecutions of corporations had been left to the regulatory authorities and violations of the Health and Safety at Work Act 1974 were generally viewed as "a means of safeguarding public safety rather than as means of attributing blame and punishing

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4 *Ibid.*, para. 17.13., listing 16 serious relevant errors on the part of British Rail.

5 C. Wells, "The Decline and Rise of English Murder: Corporate Crime and Individual Responsibility" [1988] *Criminal Law Review* 788 at pp. 795-796.

6 C. Wells, "Corporations: Culture, Risk and Criminal Liability" [1993] *Criminal Law Review* 551 at 558. See also C. Wells, "Corporate Manslaughter: A Cultural and Legal Form" (1995) 6 *Criminal Law Forum* 45 at pp. 46 and 67.

wrongdoers."[7]

Yet, a corporation was actually indicted for manslaughter after the Zeebrugge tragedy in which a ferry, *Herald of Free Enterprise*, capsized killing 192 people in 1987. The public inquiry, as found in the other disastrous cases mentioned above, revealed that "from top to bottom the body corporate was infected with the disease of sloppiness.... The failure on the part of the shore management to give proper and clear directions was a contributory cause of the disaster."[8] More importantly, Turner J., the trial judge in R. v. P & O European Ferries (Dover) Ltd., suggested the possibility that corporations can be held liable for manslaughter under English law.[9]

Since this P & O case, commentators and influential proponents of corporate liability have been increasingly vocal in their demands for creating a legal category of unlawful conduct of corporations which has been neglected by the legal system,[10] and more significantly, for establishing appropriate legal theories which can be applied to corporate manslaughter. The latter demand is particularly due to the condition established by Turner J. in the P & O case that for corporations to be held liable for manslaughter, it is necessary to prove that "a person who is the embodiment of a corporation and acting for the purposes of the corporation is doing the act or omission which caused the deaths".[11] The application of the rule "the embodiment of a corporation" (called the identification principle) to corporate manslaughter cases has been the subject of strong criticism in that "[t]he larger and more diffuse the company structure, the easier it will be for it to avoid liability."[12] Since the identification principle enables the company to incur liability only when individual defendants who are its "embodiment" can be guilty of the offence charged against it, such a derivative

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7 A. Ridley & L. Dunford, "Corporate Killing - Legislating for Unlawful Death?" (1997) 26 *Industrial Law Journal* 99 at 99.

8 Department of Transport, *mv Herald of Free Enterprise* (Report of Court No. 8074), Formal Investigation (1987, HMSO, London), para. 14.1. The detailed facts of this case will be described in Chapter 3, text accompanying notes 72-85.

9 [1991] 93 Crim. App. R. 73 at pp. 88-89.

10 Ridley & Dunford, *supra* note 7 at 99.

11 [1991] 93 Crim. App. R. 73 at pp. 88-89.

12 C. Wells, "Manslaughter and Corporate Crime" (1989) 139 *New Law Journal* 931 at 931.

nature of corporate liability has been considered to limit the scope of criminal liability of large companies unnecessarily.[13] And it is for this reason that the trial in the P & O case collapsed.

Although the present trend established in the P & O case towards holding corporations criminally liable for negligent and reckless manslaughter is a welcome departure from the legal system's prior stilted and inflexible notions of corporate manslaughter,[14] an issue still remains unresolved concerning how to establish new, feasible legal theories by which corporations can properly be held liable for manslaughter. Given that deaths and personal injuries as a result of the activities of corporations continue to happen[15] and prosecutions of them are expected, the design of new principles of corporate manslaughter is an urgent matter.[16]

The main purposes of this thesis are to examine the current status of corporate liability for manslaughter, to indicate practical and theoretical flaws from which most existing theories suffer in the context of corporate manslaughter, and to submit a new model of corporate liability for manslaughter by which individual and corporate offenders can be held liable under the same conditions.

Chapter 2 provides a general survey of the historical state of corporate criminal liability in English law. This chapter points out how two main theories have hitherto developed to hold corporations liable: the doctrine of vicarious liability and the principle of identification. In examining the adequacy of both theories in holding corporations liable generally, Chapter 2 addresses two questions: how these theories have been made

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13 This is concerned with the issue of "over- and under-inclusiveness" of the identification principle, which will be critically analysed in Chapter 3.

14 In R. v. Cory Brothers [1927] 1 K.B. 810, private prosecutions were brought against three directors of the company and against the company itself for manslaughter. However, the trial judge was simply persuaded that a corporation could not be indicted for an offence against the person. The detailed facts of this case will be described in Chapter 3.

15 In 1994, four young people on an activity holiday at the centre died because of the company's gross negligence in the running of the centre. In Kite, Stoddart & OLL Ltd. (unreported, *The Times* and *The Independent*, 9 December 1994), the company and its managing director were successfully convicted of manslaughter. The facts of this case will be examined in Chapter 3.

16 See, for example, D.J. Miester, "Criminal Liability for Corporations that Kill" (1994) 64 *Tulane Law Review* 919 at 920 (arguing that "[t]he unresponsiveness of the legal system in prosecuting corporate killers extracts a great cost from society by eroding confidence in our judicial institutions.").

compatible with the traditional criminal law aimed at individual offenders in English law and whether or not they are justifiable. The argument is advanced that although the origins of corporate liability in English law can be found in the court's attempts to put a company in an analogous position with an individual employer, theories of corporate criminal liability are not analogous to those of individual liability developed in criminal law.

Chapter 3 shifts its focus from the general survey of the status of corporate liability to case studies of corporate manslaughter The aim of these case studies is to define theoretical problems inherent in both the vicarious liability doctrine and the identification principle. The flaws from which both theories suffer stem from their legal technique of imputing individuals' fault to a company. Namely, under both theories, the company's fault is captured through individual actors' fault and their criminal responsibility, so that corporate liability is always derivative from individual liability. In addition, both theories suffer from a problem of over- and under-inclusiveness. The derivative nature of corporate liability and the problem of over- and under-inclusiveness suggest the need for new theories that emphasise the collective nature of corporate liability. That is, the corporation should be held collectively liable even when no individual is liable.

Based on the observations made in Chapter 3, Chapter 4 critically examines the aggregation theory and the existing organisation theories (proactive fault, reactive fault, and corporate policy), both of which hold a corporation liable even when there is no proof of individual faults. While indicating some of the advantages of these theories over the vicarious liability doctrine and the identification principle examined in Chapter 2, this chapter also reveals two major flaws from which they suffer: one operational and the other conceptual. Operational flaws stem from uncertainty as to certain notions used in each theory. Conceptual flaws, by contrast, involve some difficulty in reconciling each theory with fundamental principles of criminal law such as concurrence of *mens rea* with *actus reus*, culpability, and descriptive and normative usages of concept of *mens rea*. This chapter, in conclusion, emphasises the need for synthesising the existing theories of corporate liability.

Chapter 5 propounds a new model of corporate liability for manslaughter, called

"the risk-oriented theory," a key feature of which attempts to equate the requirements of conduct and mental states for individual manslaughter (proposed by the Law Commission) with those for corporate manslaughter. The risk-oriented theory is formulated by addressing the following three issues: (1) whether a corporation, rather than its personnel, can be blamed for causing death of victims; (2) for what type of conduct it should be held liable; and (3) how to construct the requisite mental states on thee part of the corporation (namely, corporate recklessness and corporate gross carelessness in cases of manslaughter). This chapter then demonstrates how the risk-oriented theory works, as compared to the existing theories of corporate liability.

Chapter 6 is concerned with the issues of corporate defences and corporate sentences. This chapter first provides the appropriate circumstances in which a corporation should be granted defences based on the broken chain of causation between corporate conduct and the prohibited result, and on the impossibility of foreseeing or avoiding the risk. Next, it addresses the issue of what factors should be considered to be aggravating or mitigating factors at corporate sentencing, in particular, under the risk-oriented theory suggested in Chapter 5. In Chapter 7, conclusions of this thesis are outlined.

CHAPTER 2

THE HISTORICAL DEVELOPMENT OF CORPORATE CRIMINAL LIABILITY IN ENGLISH LAW

2.1. Introduction

It is in the common law that the criminal liability of business corporations took root. As will be discussed later, since the Industrial Revolution the scope of corporate criminal liability has gradually been extended from public nuisance to *mens rea* offences. From comparative perspectives, however, the doctrine of corporate liability has not necessarily been agreed upon within a number of jurisdictions. The maxim that *societas delinquere non potest* (corporations are incapable of crime) is still pervasive in certain countries in the European Continent. Whilst the revised Dutch Criminal Code (1976, Article 51) and the new French Penal Code (1992, Section 121-2) provide express provisions for corporate criminal liability, corporate liability in German and Italian Penal Code is vigorously rejected.[1] Arguments for the maxim in Germany, for example, can be summarised as follows: a corporation has no body so that it is incapable

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[1] It has been reported that Article 33 of the new Slovenian Criminal Code (promulgated on 24 September 1994, enforced since 1 January, 1995) followed the French Penal Code position on the matter. By contrast, the new Spanish Penal Code (codified on 8 November 1995, promulgated on 23 November 1995) does not prescribes any express provisions of corporate criminal liability. Instead, Article 31 of the Code prescribes corporate manager's liability. It is implied by Morishita that the new Spanish Code might follow the German position. See, T. Morishita, "Gaikoku no Rippo (Foreign Legislation)" (1996) 1569 *Hanrei Jiho* 33 and (1997) 1584 *Hanrei Jiho* 38. The same can be said of the revised Portuguese Penal Code (promulgated on 17 February 1995, effective on 1 October 1995). Article 12 of the Code provides corporate manager's liability. T. Morishita, "Gaikoku no Rippo" (1998) 1651 *Hanrei Jiho* 1214 at pp. 1214-1215. In Italy, the maxim that *societas delinquere non potest* is considered to be a constitutional principle. Article 27 of the Constitution of Italy is that criminal responsibility is personal (*personale*). For comparative works on this subject, see, for example, G.O.W. Mueller, "Mens Rea and the Corporation: A Study of the Model Penal Code Position on Corporate Criminal Liability" (1957) 19 *University of Pittsburgh Law Review* 21; L.H. Leigh, "The Criminal Liability of Corporations and Other Groups: A Comparative View [hereinafter cited as *A Comparative View*] (1982) 80 *Michigan Law Review* 1508; G. Stessens, "Corporate Criminal Liability: A Comparative Perspective" (1994) 43 *International and Comparative Law Quarterly* 493; H.D. Doelder & K. Tiedemann (eds.) *La Criminalisation du Comportement Collectif* (Criminal Liability of Corporations) (1996, Kluwer Law International, The Hague).

of criminal conduct[2]; it has no mind of its own and therefore cannot entertain guilt (*Schuld*) that is based upon the ability to recognise the unlawfulness of the impugned act[3]; criminal penalties are not always suitable for corporations; and imposing penalties on corporations may affect many innocent parties.[4] These difficulties have been, according to Leonard H. Leigh, "overcome in common-law countries," but "European scholars look askance at common-law doctrines" for corporate criminal liability.[5]

Two major concerns result from this remark. The first question to be asked here is how the doctrine of corporate criminal liability has been made compatible with the traditional criminal law aimed at the individual offender in English law.[6] It is apparent in English law that this doctrine was theoretically denied centuries ago. However, as the corporation played an increasingly important role in our society, these obstacles gradually disappeared.[7] By tracing the history of the development of corporate criminal

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2 See, for example, R. Maurach & H. Zipf, *Strafrecht, Allgemeiner Teil* (1992, 8th ed., Carl Winters Universitätsbuchhandlung, Heidelberg), Vol.1, p. 165.

3 See, for example, H-H. Jescheck, *Lehrbuch des Strafrechts, Allgemeiner Teil* (1988, 4th ed., Dunker & Humbolt, Berlin), p. 204.

4 See, in general, E. Schmidhäuser, *Strafrecht, Allgemeiner Teil* (1975, 2nd ed., J.C.B. Mohr (Paul Siebeck), Tübingen), pp. 195; A. Huss, "Die Strafbarkeit der juristischen Person" (1978) 90 *ZStW* (*Zeitschrift für gesamte Strafrechtswissenschaft*) 237 at 238.

5 Leigh, *A Comparative View*, *supra* note 1 at pp. 1509 and 1527.

6 It is comprehensively suggested by several commentators that the doctrine of corporate criminal liability *was* historically not compatible with the tradition of such countries' legal system as Germany, Belgium, Finland, France, Italy, Japan, Netherlands, Portugal, Switzerland, and Russia. In these countries, on the other hand, it is well accepted that it is necessary to confiscate the illegally accrued gains derived from corporate activities. This necessity may be a starting point to realise or develop "reformatory ideas" concerning the criminal liability of corporations within or outside the tradition of individualistic legal systems. See, Doelder & Tiedemann, *supra* note 1 at pp. 1-9 (Introductory Note by Tiedemann).

7 For a historical development of corporate criminal liability in English law, see, for example, L.H. Leigh, *The Criminal Liability of Corporations in English Law* (1969, Weidenfeld & Nicolson, London) [hereinafter cited as *Criminal Liability*]. Whilst Leigh's book is mainly concerned with how corporate criminal liability has been attained in English law, this chapter is concerned with how the theoretical impediments against corporate liability, which are still dominant in some countries, have disappeared in English law. The phenomenon of the development of the doctrine of corporate criminal liability in common law is compared by Mueller to the growth of weeds. See Mueller, *supra* note 1 at 21, stating:

> "Many weeds have grown on the acre of jurisprudence which has been allotted to the criminal law. Among these weeds is... a few genes from tort law and a few from the law of business associations. This weed is called *corporate criminal liability*... Nobody bred it, nobody cultivated it, nobody planted it. It just grew."

liability in English law, the questions of how the theoretical impediments are now "overcome" will be answered.

The second issue to be dealt with is whether the theoretical principles behind corporate criminal liability are justifiable. It is well known today that corporate criminal liability in the common law world is established by imputing the acts and mental states of the actor(s).[8] From a historical point of view, it has also been brought to light that this technique of imputation was established with an analogy to the tort doctrines of *respondeat superior* and the *alter ego*.[9] What is not widely understood, however, is why the English criminal law had to rely upon such tort doctrines in the context of corporate criminal liability. In addition, little is known as to why the relevant concepts of English criminal law, such as *actus reus* and *mens rea*, have not been tailored to cases of corporate crime.[10] Several attempts have been made by both civil law and common law scholars to solve the problem of how to deter corporate crime; by the use of civil, administrative and criminal sanctions.[11] However, as long as criminal sanctions are used to do so, the question should be how the existing criminal law concepts or theories can become workable, and if not, how they can possibly change. English courts appear to prefer to borrow the imputation techniques for corporate criminal liability from tort, rather than changing or enlarging the relevant criminal law concepts. The technique of imputation of one's *actus reus* and *mens rea* to another is rarely found outside the area

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8 See, for example, E. Lederman, "Criminal Law, Perpetrator and Corporation: Rethinking a Complex Triangle" (1985) 76 *Journal of Criminal Law & Criminology* 285 at 296.

9 *Ibid.* at pp. 288-293.

10 James Gobert poses a similar question:

> "...[Courts] have perforce turned to conventional criminal law. Such laws were not created with corporation in mind. They were conceived in terms of human concepts such as *actus reus* and *mens rea*. The application of such concepts to companies was inevitably going to prove problematic. How does a company commit an *actus reus*, and where does one locate the company's *mens rea*?"

J. Gobert, "Corporate Criminality: Four Models of Fault" (1994) 14 *Legal Studies* 393 at 394. Unfortunately, Gobert does not demonstrate his attempt to change an *actus reus* and *mens rea* from "human"concepts into ones applicable to the corporate context. When applied to human actors, these concepts are still considered to be human ones.

11 For a comparative discussion, see Leigh, *A Comparative View*, *supra* note 1 at 1526, suggesting:

> "... But corporate criminal responsibility is not necessarily the only way to cope with problems of economic power.... Whether the range of sanctions is seen as penal or administrative in nature, the important point is that the sanctions be available."

of employer's criminal liability. Therefore, it is reasonable to say that the concept of imputation ought to be viewed as exceptional.[12] In terms of critical arguments against the adequacy of an analogous approach between tort and criminal law,[13] the current and next chapters will examine practical and theoretical problems inherent in the exceptional concept of imputation.

2.2. Corporate Personality

The issue of corporate criminal liability can be traced back to the Middle Ages in English Law. The corporations of medieval England were ecclesiastical bodies created for the management of church property, public organisations of the English boroughs and the crafts and mercantile guilds.[14] In the Middle Ages, "when the idea of an incorporate person was new, and the law relating to it was meagre, the lawyers do occasionally indulge in speculations of a crude and somewhat anthropomorphic kind...." to distinguish "this new entity from human persons who composed it."[15] According to these "speculations" found in the Year Books, a corporation "was said to be invisible,

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12 See, for example, J.C. Smith, *Smith & Hogan Criminal Law* (1996, 8th ed., Butterworths, London), p. 174. This is also true of the principle of identification. Under this principle, even if both a company and its controlling officer are regarded as the same, the controlling officer is still held personally and independently liable by statutes. His/her *actus reus* and *mens rea* are utilised to convict both him/herself and the company. *Ibid.* at p. 190. Thus, there is little difference in theory between "imputation" and "identification." See also Lederman, *supra* note 8 at 296-298; W.B. Fisse, "The Distinction between Primary and Vicarious Corporate Criminal Liability" (1967) 41 *Australian Law Journal* 203.

13 One commentator insists that:

> "Today the question is no longer whether it is possible to impute the acts of corporate agents to the corporation; the real question to be asked when determining the criminal responsibility of corporations is one of policy: Will the criminal sanction imposed on the corporation deter it from committing these wrongful acts in the future?"

See B. Coleman, "Is Corporate Criminal Liability Really Necessary?" (1975) 29 *Southwestern Law Journal* 908 at 920. This view is based on an erroneous assumption that theoretical problems can be solved by policy considerations. As will be seen later, the real problem inherent in the history of common law doctrines for corporate criminal liability lies in methodology of avoiding theoretical difficulties or establishing exceptional categories, rather than reestablishing the traditional rules applicable to the company. See, for example, R.S. Welsh, "The Criminal Liability of Corporations" (1946) 62 *Law Quarterly Review* 345 at pp. 350-352.

14 J.R. Elkins, "Corporations and the Criminal Law: An Uneasy Alliance" (1976) 65 *Kentucky Law Journal* 73 at pp. 85-86.

15 W. Holdsworth, *A History of English Law*, Vol. 9 (1926, 1st ed., Methuen & Co. Ltd., London) [hereinafter cited as *Holdsworth, Vol. 9*], p.70.

of no substance, a mere name, and yet a person."[16] This led to several negative conclusions as to corporate criminal liability that "it could not be outlawed or excommunicated," "be assaulted or imprisoned," or, indeed, "commit treason or felony."[17] It is reported that the medieval lawyers' deductions drawn from the nature of corporate personality were summarised by Lord Coke in the Case of Sutton's Hospital, and incorporated into modern law.[18]

> "[A] corporation aggregate of many is invisible, immortal, and rests only in intendment and consideration of the law.... They cannot commit treason, not be.... outlawed nor excommunicate, for they have no souls, neither can they appear in person, but by attorney.... A corporation aggregate of many cannot do fealty, for an invisible body can neither be in person, nor swear, ... it is not subject to imbecilities, death of the natural body, and divers other cases."[19]

This old authority concerning corporate incapacity to commit crime and to suffer punishment, deducted from the nature of corporate personality, was followed by subsequent generations. It had repeatedly been said that a corporation is "[t]he metaphysical entity,"[20] a "impalpable thing,"[21] and "an abstraction."[22] More clearly, it was expressed by Lord Wrenbury that:

> "The artificial legal person called the corporation has no physical existence. It exists only

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16 W. Holdsworth, *A History of English Law*, Vol. 3 (1935, 4th ed., Methuen & Co. Ltd., London), p.484 [hereinafter cited as *Holdsworth, Vol. 3*], citing the Year Book of Edward IV, Y.B.21 Ed. IV, f.13.

17 *Ibid.*, citing Y.B. 21 Ed. IV. P.13-14 *per* Choke, *per* Pigot, and *per* Catesby.

18 (1612) 77 E.R. 960, 973 (10 Co. Rep.23, 32b) (K.B.). See also R. Burrows, "The Responsibility of Corporations under Criminal Law" (1948) 1 *Journal of Criminal Science* 1 at 4; J.D. Barnett, "The Criminal Liability of American Municipal Corporations" (1938) 17 *Oregon Law Review* 289 at pp. 292-293.

19 (1612) 77 E.R. 973 at 973. At that time, it was considered that a corporation could not swear fealty, but a corporation sole such as a bishop could. See Burrows, *ibid.* at pp. 1-2. Burrows holds that "it was probably because such an offence was not conceived of as an entity apart from the actual holder until Tudor developments." Therefore, "[a] bishop who committed treason against a Plantagenet king found that his person and his lands were seized without regard to the fact that the office of Bishop had done no wrong although the actual holder had." *Ibid.* at 2.

20 *Per* Lord Blackburn in Pharmaceutical Society v. London & Provincial Supply Association (1880) 5 A.C. 857 at 870.

21 *Per* Jessel M. R. in Flitcroft's Case (1882) L.R. 21 Ch. D. 519 at 533.

22 *Per* Lord Haldane L. C. in Lennard's Carrying Co v. Asiatic Petroleum Co. [1915] A.C. 705 at 713.

in contemplation of law. It has neither body, parts, nor passions. It cannot swear weapons nor serve in the wars. It can be neither loyal nor disloyal. It cannot compass treason. It can be neither friend nor enemy. Apart from its corporators it can have neither thoughts, wishes, nor intentions, for it has no mind other that the minds of the corporators."[23]

The consequence of these deductions is that "[t]he company itself cannot act in its own person, for it has no person; it can only act through directors, and the case is, as regards those directors, merely the ordinary case of principal and agent."[24] It had been said that a corporation "cannot possibly have a competent knowledge,"[25] "malice or motive,"[26] and "an intention."[27] In addition, procedural obstacles concerning corporate appearance at trial and the applicable penalties were regarded as critical.[28] Since personal appearance was necessary at assizes and quarter-sessions, a corporation could not be triable for indictable offences.[29] Although in the Court of King's Bench appearance by attorney was allowed, there was the difficulty that a corporation could not enter into a recognisance.[30] This difficulty was pointed out by Coleridge J., as follows:

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23 Continental Tyre & Rubber Co. v. Daimler Co. [1915] 1 K.B. 893 at 916. In the eighteenth century, the rule of corporate incapacity was also summarised and extended by Blackstone to include felonies and other crime, stating:

> "A corporation cannot commit treason, or felony or other crime, in its corporate capacity; though its members may in their distinct individual capacities."

Blackstone, *Commentary*, Book (1765) 1, c. 18, p. 476, cited in F.P. Lee, "Corporate Criminal Liability" (1928) *Columbia Law Review* 1 at 12, n.56.

24 *Per* Cairns J.L. in Ferguson v. Wilson (1866) L.R. 2 Ch. App. 77 at 89.

25 *Per* Lord Blackburn in Pharmaceutical Society v. London & Provincial Supply Association (1880) 5 A.C. 857 at 870.

26 *Per* Lord Bramwell in Gustav Adolph Abrath v. The North Eastern Railway Co. (1886) 11 A.C. 247 at 251.

27 *Per* Lord Reading, C.J. in R. v. Grubb [1915] 2 K.B. 683 at 690.

28 The other possible obstacle was ultra vires; a corporation can only do acts that are legally empowered by law since it is a creature of the law. However, the ultra vires objection was never considered seriously by English courts not only in criminal law, but also in tort. See Smith, *supra* note 12 at p. 183; Leigh, *Criminal Liability*, *supra* note 7 at pp. 8-9; Welsh, *supra* note 13 at pp. 346-347.

29 Today, this is no longer necessary and a corporation may appear and plead through its representative by Criminal Justice Act 1925, s. 33. For procedural obstacles to corporate liability, see Leigh, *ibid.* at pp. 9-12.

30 The word "recognisance" is defined by D.M. Walker, *The Oxford Companion to Law* (1980, Clarendon Press, Oxford), as

> "[a]n obligation or bond acknowledged before a court of record or authorised magistrate and later enrolled in a court of record, whereby the person bound (cognizer or conusor) is

> "[O]n the supposition that the corporate body had been the prosecutors removing the indictment, there would have been a difficulty in strictly complying with the statute [requiring a recognisance] because they could not enter into a recognisance, although we are aware that in practice this is evaded by one or more members of the body entering into one for them: evaded, we say, rather than overcome."[31]

Moreover, at common law the penalty for treason and felony (except petty larceny) was death; therefore, even though a corporation was convicted of these crimes, it could not be made subject to the prescribed penalties. As a matter of fact, the difficulty of suffering from the penalty was employed as one of the main reasons for corporate incapacity to commit crime. Lord Blackburn, for example, stated:

> "I quite agree that a corporation cannot, in one sense, commit a crime - a corporation cannot be imprisoned, if imprisonment be the sentence for the crime; a corporation cannot be hanged or put to death, if that be the punishment for the crime; and so, in those senses a corporation cannot commit a crime."[32]

Likewise, conceptual difficulties with *mens rea*, derived from the principle that '*Actus non facit reum, nisi mens rea*' (an act does not make a man guilty, unless his mind were guilty), was indicated in the corporate context by Baron Manwood's following syllogism in the seventeenth century:

> "[N]one can create souls but God, but the King creates [a body corporate], and therefore they have no souls..."[33]

It was considered by Manwood that 'having no souls' means 'having no conscience' or criminal intent. This view was also endorsed by Channell J., holding that:

> "By the general principles of the criminal law, if a matter is made a criminal offence, it is essential that there should be something in the natures of mens rea, therefore, in ordinary cases a corporation cannot be guilty of a criminal offence..."[34]

The authorities mentioned above were mainly concerned with corporate incapacity to

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> bound to secure the performance of some act as to pay a debt, keep the peace and be of good behaviour, appear to stand trial, or otherwise."

31 R. v. Mayor etc. of Manchester [1857] 119 E.R. 1317 (7 E & B 453-456). However, this difficulty was later removed in Leyton U.D.C. v. Wilkinson (1926) 43 T.L.R. 35, by allowing a corporate agent to enter into a recognisance.

32 Pharmaceutical Society v. London & Provincial Supply Association (1880) 5 A.C. 857 at 869.

33 Tipling v. Pexall (1688) 80 E.R. 1085 (2 Bulstrode 233).

34 Pearks Gunston & Tee, Ltd. v. Ward [1902] 2 K.B. 1 at 11

commit treason or felony or any misdemeanour involving personal violence. However, there exists dicta of wider import: notably a famous dictum by Chief Justice Holt in an anonymous case. "A corporation is not indictable but the particular members of it are."[35] The credibility of this report is doubtful given that neither facts accompanying the remarks nor the context in which it was made are apparent.[36] Nevertheless, it is reported that as late as 1851 a similar general statement was followed by Shadwell V.C., holding that "the general law of England was that a corporation could not be indicted for crime."[37]

From these old authorities, which appeared until the middle of nineteenth century, several points become clear. Firstly, the issue of corporate criminal liability in English law was always analogised with that of individuals. Adherence to the nature of corporate personality, which obviously results in corporate incapacity both to perform an act and to entertain mental states, may serve as evidence of the analogical approach. To hold a company criminally liable, it was necessary to prove that the company fulfilled *actus reus* and *mens rea* requirements in exactly the same way as a natural person. The purpose of this view was not to analyse whether the nature of corporate personality is fictitious or real, but to exclude the liability of corporations from criminal law on the basis of corporate incapacity for an act and mental states.[38]

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35 Anonymous (1701) 88 E.R. 1518 (K.B.)

36 For example, Burrows comments that "That is undoubtedly true of some crimes, but, as the words cited constitute the whole report, it is impossible to speculate what limitation, if any, Lord Holt meant to be placed on his words. The series has not the highest reputation and Holt himself once wondered what posterity would think of the judges of his time when reading these "skimble skamble reports"." Burrows, *supra* note 18 at 7. See also Lee, *supra* note 23 at 4; K.F. Brickey, *Corporate Criminal Liability: A Treatise on the Criminal Liability of Corporations, Their Officers and Agents* (1984, 1st ed., Callaghan, Illinois) [hereinafter cited as *Corporate Criminal Liability*], Vol.1, §2.01; Barnett, *supra* note 18 at p. 293.

37 The Two Sicilies v. Willcox (1851) 61 E.R. 116 at 130 (1 Sim. (N.S.) 301 at 335).

38 In contrast, the legal scholars in the European Continent argued for and against corporate criminal liability by way of the nature of corporate personality; that is to say, whether it is fictitious or real. The conclusion arrived at by these scholars was that corporate criminal liability might be accepted under the Realist Theory whilst it might not under the Fiction Theory. The Realist Theory and Fiction Theory were represented by the following works respectively: O.v. Gierke, *Die Genossenschaftstheorie und die deutsche Rechtsprechung* (1963, Hildesheim, reprinted by Georg Olms Verlagsbuchhandlung) and F.K.v. Savigny, *System des heutigen römischen Rechts* (1840, Veit und Comp., Berlin).

Secondly, there were several rationales against corporate criminal liability which were submitted by the courts: corporate incapacity to act; to entertain guilt; to appear at trial; and to suffer from the appropriate punishment. A close look at these objections may reveal that they are not in logical accordance with criminal law. Given that the first step in ascertaining criminal responsibility is proof of the objective elements such as conduct, if no criminal act is proved, it is not necessary to determine whether or not the defendant has capacities for mental states, appearance at trial and punishment. Thus, the objections of corporate liability based on corporate incapacities for guilt, appearance at trial and punishment are superfluous or puzzling. As cited above, the objection of corporate liability often stemmed from corporate incapacity to suffer from the punishment.[39] But an issue of whether or not the defendant is capable of suffering from punishment is usually addressed after it is proved that s/he can commit a crime.[40] Viewed in this light, it is suggested that the objections to corporate criminal liability submitted until the middle of nineteenth century in English law cannot be regarded as theoretically sound.

Thirdly, the objections derived from the nature of corporate personality would lead to the conclusion that a corporation could not be held liable not only for crime but also for tort. In the case of the quo warranto proceedings against the City of London in 1682,[41] this argument was advanced by counsel on behalf of the City of London.

> "[A corporation] is but a name, an *ens rationis*, a thing that cannot be seen, and is no substance [*sic*]; and for this name or corporation, it is impossible they [*sic*] can do or suffer any wrong, as to be beat or be beaten, as such a body; but the wrong is made to every member of the body, as to his own proper person, and not as to the name of corporation; nor can the corporation do a personal wrong to another; nor can they [*sic*] commit treason

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39 See Lord Blackburn's argument in Pharmaceutical Society v. London & Provincial Supply Association (1880) 5 A.C. 857 at 869, *supra* note 31.

40 It is interesting to compare the state of affairs concerning corporate criminal liability at that time in England and those at present in Germany. Theoretical objections advocated by German scholars can fall into corporate incapacity either to perform a criminal act or to entertain guilt (*Schuld*). Those who are opposed to corporate capacity for guilt (*Schuld*) usually acknowledge corporate capacity for act. See, for example, Jescheck, *supra* note 3 at p. 204.

41 (1682) 8 St.Tr. 1039. In this case, the mayor of London and other officers were charged with usurping the powers entrusted to them as directors of a body politic. They taxed the citizens and pocketed the money.

or felony as to the corporation, nor against any other person."[42]

This argument, based on the speculations deduced from the nature of corporate personality, was not seriously considered by the court in this case. On the contrary, the court held that a corporation could be liable for seditious libel and other misdemeanours.[43] The following comment by Pollock on this case may help account for the outcome of the acknowledgement of corporate liability for misdemeanours.

> "[Counsel]'s interest, of course was to suggest every possible objection, technical as well as substantial, to penal proceedings against a corporation. The King's advisers, on the other hand, were prepared to go very far in ascribing both wrongful acts and wrongful intention to a corporate body, for they charged the City of London with a malicious and seditious libel. No general inference can be drawn except that there was no settled rule either way to prevent either argument from being plausible."[44]

Theoretical difficulties of imputing to a corporation malicious torts committed by its agent in the course of his employment have been "slurred over" by the courts for centuries.[45] As long as the human agent can be guilty of malice, and his master can be held liable for his servant's act, the courts saw no reason why the master should escape liability for his acts because he is a corporation.[46] In this sense, a corporation was viewed just as capable of being held liable for torts as a natural person. When public nuisance cases, mixtures of civil and criminal proceedings in nature, were brought to court, what Pollock calls "the court's preparation to imputing a corporation its agent's act and intention" led to the commencement of corporate criminal liability in English Law.

2.3. The Rules of Command or Consent, Vicarious Liability and Public Nuisance

In the previous section, the early impediment to corporate criminal liability stemming

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42 *Ibid.* at pp. 1137-1138.

43 *Ibid.* at pp. 1266-1267. The court also ordered forfeiture of the city charter, holding that the acts of the officials are to be the acts of the corporation.

44 F. Pollock, "Has the Common Law Received the Fiction Theory of Corporations?" (1911) 27 *Law Quarterly Review* 219 at pp. 231-232

45 Holdsworth, Vol. 9, *supra* note 15 at 51.

46 See, for example, Western Bamk of Scotland v. Addie (1867) L.R. 1 Sc. & Div. App. at p. 167 *per* Lord Cranworth.

from the nature of corporate personality was outlined. As seen in the case of the quo warranto proceedings against the City of London,[47] this bar was not incorporated by the court to deny the body politic's liability for the misdeeds of its officers. The technique used by the court was vicarious liability, imputing the wrongful acts and intention of the agent to the corporation. To explore the origin of corporate liability, it may be useful to make a few remarks concerning both the history of the doctrine of *respondeat superior* in tort and the early cases in which liability was imputed to corporate bodies in English law.

According to Francis B. Sayer,[48] the doctrine of *respondeat superior* (let the superior person answer) can be traced back to the time of Edward I. At that time, this doctrine meant "the statutory liability of a public official for the misfeasance of his subordinate in the performance of a public duty."[49] Between the fourteenth and eighteenth centuries,[50] the reported cases hold that a master was rendered liable for his servant's act only when the master gave his servant an express command to commit the tortious act or gave his consent to it.[51] In Kingston v. Booth,[52] the express command and consent rule was identified.

> "[I]f I command my servant to do what is lawful, and he misbehave himself, or do more, I shall not answer for my servant, but my servant himself, for that it was his own act; otherwise, it was in the power of every servant to subject his master to what actions or

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47 *Supra* note 41-43.

48 F.B. Sayer, "Criminal Responsibility for the Acts of Another" (1930) 43 *Harvard Law Review* 689.

49 *Ibid.* at 690 [footnote omitted].

50 Before the fourteenth century, there was a certain period during which a master was held liable for his slave's acts. This master's ancient liability, according to some historians, was far more severe than the present liability of the master for his servant's acts. For further details of the history of the doctrine of vicarious liability, see, for example, O.W. Holmes, "Agency" (1891) 4 *Harvard Law Review* 345; J.H. Wigmore, "Responsibility for Tortious Acts: Its History" (1894) 7 *Harvard Law Review* 315; H.J. Laski, "The Basis of Vicarious Liability" (1916) 26 *Yale Law Journal* 105; R.S. Gruner, *Corporate Crime and Sentencing* (1994, The Michie Company, Virginia), §3.3.1.

51 Sayer, *ibid.* at 691.

52 (1685) 90 E.R. 105 (2 Skinner 228).

penalties he pleased."[53]

At the end of the seventeenth century, however, Lord Holt modified the express command or consent rule. In light of the then commercial necessities, Lord Holt replaced the requirement of an express command or consent with a command implied from general authority in the following two important cases in 1690 and 1697. In Boson v. Sandford,[54] goods were spoiled during transmission in a vessel owned by several proprietors and an action for the damage was brought against all the proprietors, rather than against the master of the vessel hired by them. It was declared by Lord Holt that the owners of the vessel who employed the master were to be held liable for his negligence in respect of the freight; "for whoever employs another is answerable for him, and undertakes for his care to all that make use of him."[55] In Turberwill v. Stamp,[56] a master was indicted for a fire kindled by his servant. The fire in question was driven by a storm into his neighbour's field. Lord Holt declared that:

> "[I]f a stranger set fire to my house, and it burns my neighbour's house, no action will lie against me .... But if my servant throws dirt into the highway, I am indictable. So in this case if the defendant's servant kindled the fire in the way of husbandry and proper for his employment, though he had no express command of his master, yet his master shall be liable to an action for damage done to another by the fire; for it shall be intended, that the servant had authority from his master, it being for his master's benefit."[57]

The rule made by Lord Holt, which was supported by the ancient maxim that *qui facit per alium facit per se* (one who does something through the agency of another, does it by himself), transformed into the modern form of *respondeat superior* in the nineteenth century. The requirement of express command or consent disappeared, and the command rule implied from the master's authority was replaced with the new

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53 *Ibid.*

54 (1690) 91 E.R. 382 (2 Salkeld 440); 90 E.R. 125 (Skinner 277); 90 E.R. 377 (Comberbach 116); 89 E.R. 427 (1 Show. K.B. 29); 87 E.R. 212 (3 Mod. 322); 90 E.R. 638 (Carthew 58); 83 E.R. 678 (3 Lev. 258).

55 (1690) 91 E.R. 382 (2 Salkeld 440).

56 (1697) 90 E.R. 303 (Skinner 681); 90 E.R. 590 (Comberbach 459); 91 E.R. 1072 (1 Ld. Raym. 264); 90 E.R. 846 (Carthew 425); 91 E.R. 13 (1 Salkeld 13); 88 E.R. 1228 (12 Mod. 152); 90 E.R. 903 (Holt. K.B. 9)

57 (1697) 91 E.R. 1072 at 1073 (1 Ld. Raym. 264 at 264-265).

requirement of "within the scope of employment."[58] According to the doctrine of *respondeat superior*, "the principal is held liable for the acts of his agent committed within the scope of his employment and in the course of the business; the principal cannot escape liability even by proving that the tort was committed against his express command."[59] This doctrine is often referred to as absolute liability, that is, liability without fault.

On the other hand, the idea of liability for acts of another in criminal law has developed differently from *respondeat superior*. The early notion of criminal law was that one was not held liable for the criminal act of another unless he procured, commanded, or counselled them. The doctrine of *respondeat superior* was rejected in criminal law during the eighteenth century.[60] Instead, the liability of one for the acts of another was determined by the degree of his participation.[61] The different terminology is reflected in the two fields of law in the context of master-servant relationship. In criminal law, the act of the servant would not affect the liability of the master who did not command his servant to commit the offence, while it would in tort. Even when the master counselled or procured his servant to commit it, it is the servant in criminal law who must be treated as the principal, whilst in tort it is the master. It is for this reason that liability for acts of another in criminal law has an origin different from that in tort.[62]

Furthermore, unlike the law of torts, the requirement of the scope of the other's commands was exceedingly narrowly interpreted in criminal law. In Regina v. Saunders,[63] for example, the scope of the command or procurement of the accessory was

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58 Sayer, *supra* note 48 at 693.

59 *Ibid.*

60 *Ibid.* at pp. 694-695.

61 The term "causation" is used in Sayer's article. *Ibid* at pp. 694. According to his definition of this term, causation may be proved either "(1) by authorization, procurement, incitation, or moral encouragement, or (2) by knowledge plus acquiescence." *Ibid* at 702. This definition of what he calls causation is totally different from the modern meaning of the term. Therefore, the term "participation" is used by this thesis in this context.

62 Sayer, *ibid.* at 694.

63 (1575) 75 E.R. 705 (2 Plowden 473)

very narrowly restricted to apply to the accessory's liability. Saunders, who intended to kill his wife in order to marry another woman, consulted his friend Archer. Archer advised him to put an end to her life by poison, and bought the poison "arsenic and roseacre" for him. Saunders accordingly laced an apple with the lethal poisons and gave it to his wife. She ate a small part of it and, having felt ill, gave the rest to their three year old infant, whom neither Saunders intended to kill nor Archer advised him to kill. While their daughter was eating the poisonous apple in the Saunders' presence, Saunders did not offer to take it from her lest he should be suspected. As a consequence, the intended victim, Saunders' wife, recovered, but the daughter died of the poison two days later.

Upon the daughter's death, Saunders was charged as principal and Archer as accessory to the murder. Saunders' conviction was not in doubt. The real issue was whether Archer could be convicted as accessory to the murder of Saunders' daughter, because "[f]or the offence which Archer committed was the aid and advice which he gave to Saunders, and that was only to kill his wife, and no other."[64] By denying the probability that the murder of the daughter was "a thing consequential to the first act (of Saunders)", the judges concluded that Archer's "assent cannot be drawn further than he gave it, for the poisoning of the daughter is a distinct thing from that to which he was privy, and therefore he shall not be adjudged accessory to it."[65] The decision of this case reflects the general principle of criminal law at that time: that the liability of participants to the principal crime is based strictly upon their express command or procurement.

Further in 1730, the issue arose as to whether the rule of implied command, then being incorporated by Lord Holt into the law of torts, could apply in criminal cases. In Rex v. Huggins,[66] the defendant Huggins was the warden of the Fleet and was in charge

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64 (1575) 75 E.R. 705 (2 Plowden 473) at pp. 708-709 (2 Plowden 475). Archer's conviction would not be doubtful in the following cases: (1) if the wife died; (2) if Archer also counselled poisoning the daughter; or (3) if Archer counselled Saunders to use the poison to make the wife gravely ill so that she died from its effects. On this point, see K.F. Brickey, "Corporate Criminal Accountability: A Brief History and an Observation" (1982) 60 *Washington University Law Quarterly* 393 [hereinafter cited as *A Brief History*] at 418, n.148 and n.149.

65 (1575) 75 E.R. 705 at 709 (2 Plowden 473 at 475).

66 (1730) 93 E.R. 915 (2 Strange 882)

of the care and custody of the prisoners. He was indicted as an aider and abetter for the murder of one of the prisoners which was committed by his deputy warden, Barnes. Barnes took one of the prisoners against his will, and carried him to a newly built room in the prison without fire, chamber-pot or closet stool, the walls being damp and unwholesome. The victim had been kept in the room until he contracted sickness and died. Huggins knew the awful conditions therein, but he neither had knowledge of, nor gave Barnes the command to, transfer the victim. The central issue was whether Higgins could be guilty of Barnes' acts. The court held that despite Barnes' guilty conviction for the murder, Huggins was not guilty. The decision of this case clearly denied the doctrine of *respondeat superior* in criminal law, as can be seen in the following remark by Raymond C.J.,:

> "It is a point not to be disputed, but that in criminal cases the principal is not answerable for the act of the deputy, as he is in civil cases; they must each answer for their own acts, and stand or fall by their own behaviour. All the authors that treat of criminal proceedings, proceed on the foundation of this distinction; that to affect the superior by the act of the deputy, there must be the command of the superior, which is not found in this case."[67]

The repudiation of the doctrine of *respondeat superior* and the requirement of the express command or consent rule in criminal law were repeatedly confirmed as a general rule by English courts in subsequent years,[68] and were greeted favourably by English commentators.[69] When applied to a corporation, the general rule led to an obvious conclusion: a corporation is not capable of giving command or consent and, accordingly, was generally exempted from criminal liability.[70] One of the exceptions to the express command or consent rule was that a master was held liable for a public

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67 *Ibid.* at 917 (2 Strange 882 at 885).

68 *Per* Lush, J. in The Queen v. Holbrook (1878) 4 Q.B.D. 42, at 46, 47 and 51; *per* Cave, J. in Chisholm v. Doulton (1889) 22 Q.B.D. 736 at 741; *per* Collins, J. in Hardcastle v. Bielby [1892] 1 Q.B. 709 at 712. See also Roberts v. Woodward (1890) 25 Q.B.D. 412 at 415; Pearks Gunston & Tee, Ltd. v. Ward [1902] 2 K.B. 1 at 11.

69 See, for example, Welsh, *supra* note 13 at 348; C.R.N. Winn, "The Criminal Responsibility of Corporations" (1929) 3 *Cambridge Law Journal* 398, at pp. 405-415.

70 T.J. Bernard, "The Historical Development of Corporate Criminal Liability" (1984) 22 *Criminology* 3 at 6.

nuisance created by his servant, such as non-repair of roads, bridges or canals.[71] The rest of this subsection is devoted to the historical development of the master's vicarious liability for the public nuisance and its application to corporate cases in English law.

It has been said by some commentators that Rex v. Medley[72] and The Queen v. Stephens[73] are the leading cases which established an exception to the express command or consent rule in criminal law.[74] In Rex v. Medly, the directors and workers of the Equitable Gas Company were indicted for conveying waste from its plant into the river Thames. The waste destroyed fish in the river and consequently deprived many fishermen of their livelihood. The effluent was described as "nasty stuff fit to poison a horse."[75] The defendant directors of the company, the chairman, deputy chairman and the superintendent raised in defence their ignorance of the situation because they rarely visited the plant or interfered in the management of the works.[76] The dumping of the sludge into the river "was only an expedient resorted to by the workmen"[77] as a consequence of the failure of the evaporation system designed to dispose of the refuse. They also argued that if the engineer had not established a mode of consuming the noxious matter by evaporation, "the company must have ceased for a time to light the distinct."[78]

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71 The other exceptions are the master's vicarious or strict liability for his servant's criminal libel and statutory offence. Welsh, *supra* note 13 at pp. 348-350 ; Sayer, *supra* note 48 at pp. 708-714. Of these three exceptions, the emphasis in this chapter is placed both upon the public nuisance offence and upon statutory ones, since, as will be analysed later, it is considered to be the offences for which a corporation was held liable at first, and with which the limits of corporate liability had been extended to *mens rea* offences in English law.

72 (1834) 172 E.R. 1246 (6 Car. & P. 292).

73 (1866) L.R. 1 Q.B 702.

74 See, for example, Sayer, *supra* note 48 at 708; Welsh, *supra* note 13 at 348, n.25; Brickey, *A Brief History, supra* note 64 at pp. 418-421. See also Law Commission, *Legislating the Criminal Code: Involuntary Manslaughter* (1996, HMSO, London, Law Com. No. 237) [hereinafter cited as *Legislating*], p. 69.

75 (1834) 172 E.R. 1246 at 1247 (6 Car. & P. 292 at 294).

76 *Ibid.* at 1249 (6 Car. & P. 292 at 297).

77 *Ibid.*

78 *Ibid.*

However, Denman C. J., in his instruction to the jury, held that the directors' ignorance of what had been done made no difference, provided that they gave authority to the others to operate the plant. "[I]f persons for their own advantage employ servants to conduct works [*sic*], they must be answerable for what is done by those servants."[79] Consequently, the directors (chairman, deputy chairman and superintendant) and engineer were found guilty by the jury for the nuisance charge, but workers employed by them were not.

In another nuisance case, The Queen v. Stephens,[80] the defendant, an owner of a slate quarry, was indicted for obstructing the navigation of the Tivy River by virtue of his workmen having thrown slate stone and rubbish into the river. Since he was eighty years old and unable personally to superintend the working of the quarry, the business was managed for his benefit by his son. He was prepared to offer evidence that the employees had been prohibited by both himself and his son from depositing the rubbish in the river. The court, however, held the defendant liable for public nuisance on the basis that a principle concerning civil cases was applicable, since the proceeding in this case was criminal in form, albeit essentially civil in nature. The principle was that a master was held liable for his servant's wrongful conduct provided the servant acted in the scope of his employment, even if the conduct was against the master's orders.[81] Mellor J. held that:

> "Inasmuch as the object of the indictment is not to punish the defendant, but really to prevent the nuisance from being continued, I think that the evidence which would support a civil action would be sufficient to support an indictment."[82]

As for the nature of the indictment in this case, Blackburn J. also declared that:

> "[W]here a person maintains works by his capital, and employs servants, and so carries on the works as in fact to cause a nuisance to a private right, for which an action would lie, if the same nuisance inflicts an injury upon a public right the remedy for which would be by indictment, the evident which would maintain the action would also support the

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79 *Ibid.* at 1250 (6 Car. & P. 292 at 299).

80 (1866) L.R. 1 Q.B. 702.

81 *Per* Mellor J. in *ibid.* at pp. 708-709.

82 *Ibid.* at 710.

indictment."[83]

The reason why in this case the indictment, proceedings of which were criminal, lay against the defendant is that the nuisance, "instead of being merely a nuisance affecting.... individuals, affects the public at large, and no private individual, without receiving some special injury, could have maintained an action."[84] More noteworthy is the remark by Blakburn, J. in this case that "the general rule that a principal is not criminally answerable for the act of his agent" in criminal law was not infringed by this case.[85] As Welsh argued, "although the exception seems to be established, it is regarded as anomalous, and the Courts have shown no disposition to extend it."[86]

Before these cases, however, the master's vicarious liability for public nuisance had already been accepted and established by English courts in the corporate context during the seventeenth and eighteenth centuries.[87] During this period, the inhabitants of local governmental units, such as boroughs, municipalities, parishes, counties and the like which were called "quasi-corporate entities" or "quasi-municipal corporations,"[88] were held liable for creating a public nuisance if the local officials failed to repair a public convenience. The failure of these corporate entities to maintain roads, waterways or bridges was viewed at law as a breach of the common law duty, that is, a nuisance

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83 *Ibid.*

84 *Per* Mellor J., *supra* note 81.

85 *Per* Blackburn J., *supra* note 80 at 710.

86 Welsh, *supra* note 13 at 348.

87 See, for example, Bridges & Bichol's Case (1623) 78 E.R. 204 (Godb. 346); King v. The Mayor & Commonality of London (1632) 79 E.R. 920 (Cro. Car. 252); The Case of Langforth Bridge (1635) 79 E.R. 919 (Cro. Car. 365); King v. Mayor & Burgesses of Warwick (1682) 89 E.R. 890 (2 Show. 201); The Queen v. Inhabitants of Cluworth (1705) 87 E.R. 920 (6 Mod. 163); The Queen v. Saintiff (1705) 87 E.R. 1002 (2 Mod. 256); Regina v. Inhabitants of Com. Wilts (1705) 91 E.R. 313 (1 Salkeld 359); Rex v. Inhabitantes Civitatis Norwichi (1718) 93 E.R. 458 (1 Stra. 177); King v. Inhabitants of the West Riding of Yorkshire (1770) 96 E.R. 401 (2 Black. W. 684).

88 Barnett, *supra* note 18 at 289. For the history of the development of corporations before the nineteenth century, see, in particular, S. Williston, "History of the Law of Business: Corporations before 1800" (1888) 2 *Harvard Law Review* 105, 149

abatable by criminal proceedings.[89] This exception to the command or consent rule in the criminal law is said to be the original source for criminal liability of corporations in English law.[90] The indictments of public corporations for nuisance offences continued to be prosecuted until mid-nineteenth century.[91]

At the turn of the nineteenth century, a wave of incorporation of a number of large corporate bodies took place as a consequence of the Industrial Revolution in Britain. In particular, the advent of the railroads led private business corporations to be set up under private acts.[92] These corporations were chartered to construct and maintain public facilities such as transportation, and were directly comparable to the local governmental units prior to the nineteenth century in England, which assumed the municipal duties to maintain and repair bridges, canals and roads.[93] It followed that the next step was to hold private business corporations liable for public nuisance offences when they failed in their duties to maintain public facilities. At first, a railway company was held liable for non-feasance in The Queen v. Birmingham & Gloucester Railway

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89 It is interesting to note that the master-servant relationship in old cases were ascertained by the English courts between such a public corporation and its individual local officials. The reason for this is best explained by Brickey.

> "In decisions imposing liability on such public entities, the courts ordinarily observed that the public convenience in question (usually a bridge or road) had been erected before the present inhabitants had taken on the responsibilities of the town, parish, or county; that it had been maintained by former inhabitants; and that present inhabitants were bound to do the same. The corporation was responsible for making the needed repairs before the present mayor, aldermen, and burgesses became its directors, and the duty to repair followed the corporation, not its former members."

Brickey, *A Brief History*, *supra* note 64 at 402. See also Bernard, *supra* note 70 at 6.

90 Bernard, *ibid.*

91 For cases reported during the nineteenth century, see, for example, King v. Mayor of Liverpool (1802) 102 E.R. 529 (3 East 348); King v. Mayor of Stratford upon Avon (1811) 104 E.R. 636 (14 East 348); King v. Seven & Wye Ry. (1819) 106 E.R. 501 (2 B. & Ald. 646); Henry v. The Mayor & Burgesses of Lyme Regis (1828) 130 E.R. 995 (5 Bing. 91), (1934) 131 E.R. 1103 (1 Bing (N.C.) 222; Wilkes v. Hungerdord Market Company (1835) 132 E.R. 110 (2 Bing (N.C.) 282); Queen v. The Mayor & C. of the City of Lincoln (1838) 112 E.R. 760 (8 AD. & E. 65); Queen v. The Eastern Counties Railway Company (1839) 113 E.R. 201 (10 AD. & E. 531).

92 For the legislative development concerning corporate liability during this period, see Leigh, *Criminal Liability*, *supra* note 7 at pp. 20-22.

93 Bernard, *supra* note 70 at 7. See also C. Wells, *Corporations and Criminal Responsibility* (1993, Clarendon Press, Oxford), pp. 97-98.

Company.[94] A railway company was indicted for disobeying an order of the justices which had been confirmed at the Quarter Sessions, for constructing a bridge over a road. Parke B. pointed out that the only difficulty in this case was how the company was to appear on Assize,[95] and ordered the removal of the indictment by *certiorari* to the Queen's Bench. In the Queen's Bench, counsel for the corporation put in a demurrer that a corporation could not be indicted,[96] as pointed out in the Case of Sutton's Hospital[97] and by Chief Justice Holt in an Anonymous case.[98] Patteson J., relying upon precedents concerning the public corporation's liability for nuisance, overruled this demurrer and stated:

> "What the nature of the offence was to which the observation [of Holt C.J.] was intended to apply does not appear; and as a general proposition it is opposed to a number of cases, which shew that a corporation may be indicted for breach of a duty imposed upon it by law, though not for a felony, or crimes involving personal violence, as for riots or assaults."[99]

What was established from this case was the indictment of a business corporation for non-feasance.[100] During the middle of the nineteenth century, "a brief hesitation was shown by the courts [in the US.] in extending the criminal liability [of corporations for

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94 (1842) 114 E.R. 492 (3 Q.B. 222). See also Regina v. The Birmingham & Gloucester Railway Company (1840) 173 E.R. 915 (9 Car. & P. 469).

95 (1840) 173 E.R. 915 at 916 (9 Car. & P. 469 at 470). If the indictment were in the Court of Queen's Bench, the company would appear by attorney.

96 (1842) 114 E.R. 492 at 493 (3 Q.B. 222 at 225).

97 See *supra* text accompanying notes 18 and 19.

98 See *supra* text accompanying note 35.

99 (1842) 114 E.R. 492 at 496 (3 Q.B. 222 at 232).

100 Patteson J. admitted that the avoidance of the requirement of personal appearance by corporations at sessions "may indeed impose some difficulty upon the prosecutor, and render his proceeding more circuitous, as he will be obliged to remove the indictment by certiorari into this Court in order to make it effective". "[B]ut the liability of the corporation is not affected." *Ibid.* (3 Q.B. 232 at 233). The "circuitous" problem was solved by Summary Jurisdiction Act, c. 49, allowing a company to be brought before a court of summary jurisdiction by its attorney. Later, section 33 of the Criminal Justice Act 1925 extended the removal of this procedural obstacle to the case of trial on an indictment, by providing that a corporation may appear and plead through its representative.

non-feasance] to misfeasance."[101] Frederic P. Lee observes that the American courts' adherence to the distinction between non-feasance and misfeasance as to corporate criminal liability was based upon "a vague feeling that their artificial persons can be more easily conceived of as failing to act than having the physical body necessary, for example, to carry logs with which to obstruct rivers and highway."[102] As compared to American situations mentioned above, this argument against corporate liability for misfeasance, what Lee calls the "quixotic battle,"[103] did not last for a long time in English law. In The Queen v. Great North of England Railway,[104] a railway company was indicted for misfeasance in cutting through and obstructing a public highway with its railway line, which did not satisfy the statutory provisions. The corporation's defence was to distinguish between a misfeasance and a non-feasance, arguing that an indictment against a company would not lie in relation to the former.[105] Lord Denman found, however, that a clear line between an omission and a positive act was not always easily drawn,[106] since it is "as easy to charge one person, or a body corporate, with

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101 Lee, *supra* note 23 at 5, examining some American cases where corporate criminal liability for misfeasance was refused during this period.

102 *Ibid.*

103 *Ibid.* n.10. Unfortunately, this quixotic battle is replayed in the Law Commission, *Criminal Law, Involuntary Manslaughter* (Consultation Paper No. 135) (1994, HMSO, London) [hereinafter cited as *Consultation Paper*], para. 5.77., stating:

> "It is in our view much easier to say that a *corporation*, as such, has failed to do something, or has failed to meet a particular standard of conduct than it is to say that a corporation has done a positive act, or has entertained a particular subjective state of mind."

An erroneous point made by the Law Commission lies in its vagueness in distinguishing between a positive act and an omission in criminal law. This point will be critically analysed in Chapter 5.

104 (1846) 115 E.R. 1294 (9 Q.B. 315).

105 *Ibid.* at 1297 (9 Q.B. 315 at 323), arguing that:

> "For a nonfeasance there would be no other remedy, except in the cases where mandamus lies, inasmuch as the omission cannot be the omission of any particular individual: but where an indictable act is done, the individual doing it may be indicted, and so may any individual members of the corporation who have given the illegal command."

What is apparent in this extract is that it was, and it is believed, as suggested in *supra* note 103, that a corporation is only capable of an omission offence; that is, a positive act can only be done by individual members of the company.

106 "If A. is authorised to make a bridge with parapets, but makes it without them, does the offence consist in the construction of the unsecured bridge, or in the neglect to secure it?" *Ibid.* at 1298 (9 Q.B. 315 at 325).

erecting a bar across a public road as with the non-repair of it; and they may well be compelled to pay a fine for the act as for the omission."[107] It was also for this reason that Lord Denman held that, even if it were possible to distinguish the two, there was no legal reason why a corporation should be liable for the one type of offence and not for the other.

Finding it impossible to adhere to a logical distinction between a non-feasance and a misfeasance, Lord Denman extended the limits of corporate criminal liability from the former to the latter. The background for this extension can be explained by public policies imposing criminal liability upon corporations as well as individuals under the development of vicarious liability for torts during the eighteenth and nineteenth centuries.[108] Lord Denman goes on to state:

> "[T]he public knows nothing of the former [individuals who concur in voting the order]; and the latter [ones who concur in executing the work], if they can be identified, are commonly persons of the lowest rank, wholly incompetent to make reparation for the injury. There can be no effectual means for deterring from an oppressive exercise of power for the purpose of gain, except the remedy by an indictment against those who truly commit it, that is, the corporation acting by its majority: and there is no principle which places them beyond the reach of the law for such proceedings."[109]

As Leonard H. Leigh points out, Lord Denman might expect that imposing liability upon the corporation could foster a check by shareholders of the company on corporate management, which is quite similar to the rationale for the imposition of vicarious liability upon a master for his servant in tort "that the master was responsible for the actions of his servants because he had the selection of them."[110]

The scope of corporate liability for non-feasance was extended to misfeasance in the case of Great North of England, and general corporate liability for public nuisance was established. It is entirely fair to say that the establishment of corporate liability for

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107 *Ibid.* (9 Q.B. 315 at 326).

108 Leigh, *Criminal Liability*, *supra* note 7 at 17. During this period, corporate liability had been accepted for trover, trespass and negligence. Lord Denman also referred to a case of trespass in which a corporation was held liable. *Ibid.*

109 *Ibid.* A similar account is taken of in G.F. Canfield, "Corporate Responsibility for Crime" (1914) 14 *Columbia Law Review* 469 at pp. 472-473.

110 Leigh, *Criminal Liability*, *supra* note 7 at 19.

public nuisance in English law until the middle of the nineteenth century was premised upon a mixture of two parallel liability models whose development then concurred with each other: an individual master's vicarious liability for his servants' tort and the liability of quasi-municipal corporations to maintain and repair the public facility.[111] Although still considered fictitious and, thus, incapable of criminal conduct and mental states of its own, a corporation was not viewed in the history of English law as "so abstract, impalpable or metaphysical"[112] that it could not be deemed comparable to an individual principal or master in the case of public nuisance. This helped for the analogous approach between individual master's liability for his servant's tort and liability of a corporate "master" for nuisance. Furthermore, in the middle of the nineteenth century, the role which the governmental units used to play to maintain transportation had been taken over by private corporations in England.[113] Especially, when railroad corporations were chartered to construct and maintain transportation facilities, the emphasis on the maintenance and responsibility of them was transferred from the governmental units to private corporations.

On the other hand, new limits were also established in the case of Great North of England. Lord Denman concluded that corporations could not be guilty of treason, felony, perjury, offences against the person or acts of immorality, by stating:

> "These plainly derive their character from the corrupted mind of the person committing them, and are violations of the social duties that belong to men and subjects. A corporation, which, as such, has no such duties, cannot be guilty in these cases: but they may be guilty as a body corporate of commanding acts to be done to the nuisance of the community at large."[114]

In other words, a new distinction concerning corporate liability was drawn between crimes involving *mens rea* and those not involving it. In the case of public nuisance

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111 Wells, *supra* note 93 at 98.

112 Welsh, *supra* note 13 at 347.

113 Bernard, *supra* note 70 at pp. 6.

114 (1846) 115 E.R. 1294 at 1298 (9 Q.B. 315 at 326). Later, this statement was referred to in Cory Brothers. Ltd. [1927] 1 K.B. 810, the first case in which a corporation was indicted for manslaughter in English law. Factual backgrounds of this case will be examined in the next chapter.

offences, it was not any member of the corporation, but the corporation itself on which a legal (and absolute) duty was imposed by law to maintain and repair the public facility. Therefore, it was not necessary for the court to deal with the issue of corporate capacity for mental states. Whether or not a corporation was capable of its own mental states, a corporation could absolutely be held liable for public nuisance offences. It is for this reason that the liability of corporations for crimes *not* involving *mens rea* was firmly established in the first half of the twentieth century.

2.4. Corporate Criminal Liability for Strict Liability Offences

At the end of the nineteenth century and the early part of the twentieth century, a steady extension of corporate criminal liability was observed. With the accomplishment of the Industrial Revolution and the rapid development of a capitalistic economy, various kinds of social problems occurred, and state intervention to solve them was thought necessary. As a result, with the increasing need for the regulation of social life, numerous statutes were codified. Furthermore, since the stock company legislation was established with the codification of the Companies Acts of 1863, the number of business entities taking corporate form dramatically increased. This caused business corporations to start assuming critical roles in most fields of enterprise. Accordingly, most of these statutes were necessarily concerned with corporate business activities and subjected them to regulation.[115]

To begin with, public nuisance offences, which played an important part in holding public and private corporations liable in the last century, not only became subject to the intervention of equity in granting injunctions to restrain public nuisance but were also transformed into summary conviction offences. A number of statutes (called "clauses acts") were codified during the middle of nineteenth century for the purpose of regulating the activities of corporations carrying out public utility functions such as railway and gas works.[116]

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115 Leigh, *supra* note 7 at 21.

116 Leigh, *ibid.*, referring to the Gasworks Clauses Act 1847, the Town Improvement Clauses Act 1847, the Waterworks Clauses Act 1847, the Harbours, Docks and Piers Clauses Act 1847, the Cemeteries Clauses Act 1847 and the Railway Clauses Consolidation Act 1845.

Moreover, the general principle of criminal law was forced to change under the influence of the comprehensive introduction of new types of liability: that is, strict liability and vicarious liability.[117] Most offences provided by these newly codified statutes were not considered by the English court to be real crimes, but quasi-criminal acts similar in nature to public nuisance offences.[118] More specifically, these "public welfare offences" did not require proof of *mens rea* on the part of the offender for two reasons: (1) the penalties for this type of crime were petty fines; and (2) the express provision of the statute requiring the proof of mental states or fault was omitted by the legislature.[119] Moreover, as the new statutes were aimed at regulating various kinds of economic activities, their applicability to business corporations, as employers taking vicarious responsibility for their servant's violative acts, was taken for granted.[120] Under the vicarious liability doctrine, neither the proof of the corporate employer's *mens rea* nor conduct were strictly required; instead, only the proof of its employee's violative conduct sufficed for holding a company vicariously liable.

Most important of all for the expansion of corporate liability during this time is the definition of "person" in the Interpretation Act 1889 Section 2 (1), prescribing "...the expression 'person' shall, unless the contrary intention appears, include a body corporate."[121] The inclusion of corporations in "person" contained in statutes certainly established a foothold of corporate liability for, at least, strict liability offences at that

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117 For detailed outlines of some significant changes in criminal law between the latter half of the nineteenth century and the first half of the twentieth century, see, for example, L. Hall, "The Substantive Law of Crimes - 1887-1936" (1937) 50 *Harvard Law Review* 616; A.J. Harno, "Some Significant Developments in Criminal Law and Procedure in the Last Century" (1951) 42 *Journal of Criminal Law, Criminology & Police Science* 427.

118 See, for example, Sherras v. De Rutzen [1895] 1 Q.B. 928 at 932.

119 For a full account of the formative period of strict liability or public welfare offences, see, for example, F.B. Sayer, "Public Welfare Offenses" [hereinafter cited as *Public Welfare Offenses*] (1933) 33 *Columbia Law Review* 55; R.A. Wasserstrom, "Strict Liability in the Criminal Law" (1960) 12 *Stanford Law Review* 732; C. Manchester, "The Origin of Strict Criminal Responsibility" (1977) 6 *Anglo-American Law Review* 227; L.H. Leigh, *Strict and Vicarious Liability: A Study in Administrative Criminal Law* [hereinafter cited as *Strict & Vicarious Liability*] (1982, Sweet & Maxwell, London) pp. 11-18.

120 For the formative period of vicarious liability, see Leigh, *Strict & Vicarious Liability, ibid.* at pp. 18-24; Sayer, *Public Welfare Offenses, ibid.*

121 Leigh, *Criminal Liability, supra* note 7 at pp. 22-23.

time.[122] It is likely that the following remark of Lord Blackburn in Pharmaceutical Society v. London & Provincial Supply Association influenced the legislation of this Act:

> "...But a corporation may be fined... If you could get over the first difficulty of saying that the word "person" [contained in 31 & 32 Vict. C.121, s.1 (the Pharmacy Act)] here may be construed to include an artificial person, a corporation, I should not have the least difficulty upon those other grounds which have been suggested."[123]

The issue of whether a corporation was included in the word "person," which appeared in the statute, was also considered by the English court in Pearks Gunston & Tee v. Ward.[124] The focal point in this case was whether the term "person" contained in Section 6 of the Sale of Food and Drugs Act 1875 included corporations. The affirmative answer was submitted by Channel J. The reasoning of his judgement seems to place special emphasis upon the distinction between strict liability offences and *mens rea* ones in nature.

> "... But there are exceptions to this rule [that a corporation cannot be guilty of a criminal offence involving *mens rea*] in the case of quasi-criminal offences, as they may be termed, that is to say, where certain acts are forbidden by law under a penalty, possibly even under a personal penalty, such as imprisonment, at any rate in default of payment of a fine; and the reason for this is, that the Legislature has thought it so important to prevent the

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122 Leonard H. Leigh may disagree with this point. See *ibid.* at 23, stating:

> "[N]o writer of authority writing at that time when the Interpretation Act was passed contemplated that the effect of the section would be to extend liability for all, or even most statutory offences, to corporations. Nor was such a possibility contemplated by the judges." [Footnotes omitted]

However, it cannot be denied that such legislative or interpretative steps made it easier for the then judges to apply the doctrines of strict liability or vicarious liability to corporations. Considering that in most jurisdictions in which corporate criminal liability is accepted, the inclusion of corporations in "person" provided in laws was the first step to deal with the issue of corporate criminal liability in criminal law. The importance of the existence of an express provision of corporate liability cannot be overemphasised. See, for example, Article 121-2 of the New French Penal Code; Article 51 of the Dutch Criminal Code. This point is more clearly indicated by an American scholar, Elkins, *supra* note 14 at pp. 98-99, as follows:

> "Today, both state and federal criminal law are statutory in origin. Thus, courts called upon to impose corporate criminal liability will generally consider as a threshold question whether the statute which creates the offense charged contemplates corporate wrongdoing. The criminal statute involved may, by its terms, expressly apply to corporations and in such cases the courts have little difficulty in imposing liability." [Footnotes omitted]

123 (1880) 5 A.C. 857 at 860-870, referred to in *supra* note 20. It is noteworthy that before the Interpretation Act 1889 was codified, the Lord Brougham's Act 1850 excluded corporations from the definition of the term "person".

124 [1902] 2 K.B. 1, referred to in *supra* note 34.

> particular act from being committed that it absolutely forbids it to be done; and if it is done the offender is liable to a penalty whether he had any mens rea or not, and whether or not he intended to commit a breach of the law. Where the act is of this character then the master, who in fact, has done the forbidden thing through his servant, is responsible and is liable to a penalty. There is no reason why he should not be, because the very object of the Legislature was to forbid the thing absolutely. It seems to me that exactly the same principle applies in the case of a corporation. If it does the act which is forbidden it is liable."[125]

As hinted at in the last two sentences of the above extract, the corporation was in effect considered to be analogous to an individual master; this enabled it to incur vicarious liability for this servant's "absolutely forbidden" conduct. Similar to the case of public nuisance, an absolutely forbidden act means that a legal duty is imposed by statute upon a corporation, as a master, to prevent that act from being carried out by its servants. The issue of why a breach of such duty constitutes a criminal offence was addressed by the court more than a decade before this case. In The Queen v. Tyler & the International Commercial Co. Ltd.,[126] an issue at point was whether the proceedings before the magistrate against a joint stock company for the recovery of penalties under Section 27 of the Companies Act 1862 was a criminal cause or matter. The defendant corporation argued that the proceeding was not criminal, since a corporation could neither be guilty of a criminal act nor have a *mens rea*. The reasoning expounded by Bowen L.J. in answering this issue in the affirmative helps account for the development of corporate criminal liability with analogy to an individual master's vicarious liability in English law.

> "It was ... contended on behalf of the appellant that no criminal proceedings can be taken against a company... It would seem contrary to sound sense and reason, if such a technical objection could succeed. Where, for instance, a statute creates a duty upon individual persons, it would be a strange result if the duty could be evaded by those persons forming themselves into a joint stock company. The point becomes still more incapable of argument where the statute prescribes the duty in the company itself. How can disobedience to the enactment by the company be otherwise dealt with? The directors or officers of the company, who are really responsible for the neglect of the company to comply with the statutory requirements, might not be stuck at by the statute, and there would be no way of enforcing the law against a disobedient company, unless there were in such cases a remedy by way of indictment. It may, therefore, I think, be taken that

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125 *Ibid.* at 11. Legislative emphasis in absolutely prohibiting certain conduct is on administrative convenience rather than the importance of the forbidden conduct itself. Burrows, *supra* note 18 at 15.

126 [1891] 2 Q.B. 588.

> where a duty is imposed upon a company in such a way that a breach of the duty amounts to a disobedience of the law, then, if there is nothing in the statute either expressly or impliedly to the contrary, a breach of the statute is an offence which can be visited upon the company by means of an indictment."[127]

It is apparent from this reasoning that the English courts attempted to hold both a company and an individual equally liable. Otherwise, any individual member of the corporation would easily escape criminal liability in cases where a "person" in the statute was a corporation. As a matter of fact, when the courts applied the doctrine of vicarious liability to the case of the corporate defendant, it did not matter whether the breach of a duty imposed by law upon a corporation was civil or criminal in nature. What did matter to them was how to hold a master vicariously liable for the acts of his servant even when he had neither authorised nor expressly forbidden those acts. There was no reason for the courts to refrain from holding the company vicariously liable when they found the indictment against the company was the only effective way for the enforcement of the statute.

Since the cases of Pearks Gunston and Tyler, English courts had held corporations for indictment of nuisance,[128] offences under the Factories Acts, [129]the Sales of Food and Drugs Acts,[130] the Public Health Acts, [131] the Coal Mines Regulation Acts, [132] and the Merchandise Marks Act.[133] In these cases, the issue of whether or not corporate *mens rea* is the legal matter was, at least, evaded. In Chuter v. Freeth & Pocock, Ltd.,[134]

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127 *Ibid.* at 592-593.

128 Herbert v. Leigh Mills Company Ltd. (1889) 53 J.P. 679; Patterson v. Chamber Colliery Co. (1892) J.P. 200; Star Omnibus Co. (London) Ltd. v. Tagg (1907) 97 L.T. 481; Armitage Ltd. v. Nicholson (1913) 108 L.T. 993.

129 Pearson v. Belgian Mills Co. Ltd. [1896] 1 Q.B. 244; Crabtree v. Commercial Mills Spinning Co. Ltd. (1911) 75 J.P. 6; Crabtree v. Fern Spinning Co. Ltd. (1910) 85 L.T. 549.

130 Apart from the case of Pearks Gunston, see, for example, Starey v. Chilworth Gunpowder Co. (1890) 24 Q.B.D. 90; Star Tea Co. v. Neale (1909) 73 J.P. 511; Chuter v. Freech Pocock, Ltd. [1911] 2 K.B. 832.

131 Regina v. Ascanio Puck & Co. (1912) 76 J.P. 487.

132 David v. Britannic Merthy Coal Co. [1909] 2 K.B. 146.

133 Starey v. Chilworth Gunpowder Co. (1890) 24 Q.B.D. 90

134 [1911] 2 K.B. 832.

for instance, a corporation was charged with a violation of the Sales of Food and Drugs Acts 1899. Although the offence at issue did not require *mens rea*, there was a defence provided in Section 20 of the Act that when "he gave the warranty he had reason to believe that the statements or descriptions contained therein were true." It was contended by the defendant corporation that since the exempting clause made an innocent belief a defence, the offence could only be committed by a defendant who was capable of *mens rea*, and that a corporation not being so capable could not therefore commit the offence.[135] The magistrate held in favour of the defendant corporation that it was not liable under the section because such a defence could not be open to it. However, the Divisional Court held the contrary, on the ground that the interpretation of "the person" in the section made by the magistrate which excluded the corporation was too narrow. Lord Alverstone C.J. held that:

> "There is no reason why a warranty should not be given by a corporation. It can give a warranty through its agents, and through its agents it can believe or not believe, as the case may be, that the statements in the warranty are true. A similar point has been raised in cases concerning the liability of a corporation in actions which, in the case of an individual, would involve an inquiry into a state of mind, such as fraud, libel, or malicious prosecution. It is well settled that a corporation may be liable in all those actions."[136]

The crucial point in the reasoning cited above is that the mental states including the exculpatory belief were determined by corporate agents, not by the corporation itself. The doctrine for this imputation of the state of mind of an agent to a principal, which was used by the court, clearly referred to the vicarious liability method in tort.[137] The troublesome issue of how a corporation itself can entertain its own mental states was not addressed in this case. What was important to the court was the social fact that the warranty in question could be given not only by an individual but by the corporation through its agents. While the theoretical justification for the imputation of the mental states of corporate agents to the corporation in criminal law was evaded, the court attached importance to the social reality that various kinds of business had been

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135 *Ibid.* at 834.

136 *Ibid.* at 836.

137 The liability of corporations for tort involving malice was well established by the English court at the early stage of the twentieth century. See Leigh, *supra* note 7 at 22.

conducted in the corporate form since the turn of the twentieth century.[138] The conceptual obstacle that a corporation is not capable of *mens rea*, adhered to by lawyers and courts until the nineteenth century, was undermined by this case.

The following civil case may provide a good example of how English courts dealt with the issue of imputation of the state of mind of corporate agents to the corporation. In Citizen's Life Assurance Co. Ltd. v. Brown,[139] the defendant company was held civilly liable for libels published by its agents. Lord Lindley denied the argument of counsel for the company that malice cannot be imputed to the company, and delivered the opinion of the Privy Council.

> "If it is once granted that corporations are for civil purposes to be regarded as persons, i.e., as principals acting by agents and servants, it is difficult to see why the ordinary doctrines of agency and of master and servant are not to be applied to corporations as well as to ordinary individuals.... To talk about imputing malice to corporations appears to their Lordships to introduce metaphysical subtleties which are needless and fallacious. If [one of the corporate agents] published the libel complained of in the course of his employment, the company are liable for it on ordinary principles of agency."[140]

The reasoning developed by Lord Lindley is quite simple: when the imputation of the acts of corporate agents is acknowledged according to the principle of agency, there is no reason why the imputation of their mental states to the corporation cannot be harmoniously accepted. This is best explained by Frederick Pollock, indicating that:

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138 In the US., the imputation of the acts and mental states of corporate agents to the corporation was well established in 1909. In New York Central & Hudson River Railroad Co. v. United States (1909) 212 U.S. 481, the emphasis for the imputation was upon the public policy that criminal punishment against a corporation would be the only effective method of controlling corporate misconduct and correcting the abuses the statute was aimed at.

> "We see no valid objection in the law, and every reason in public policy, why the corporation which profits by the transaction and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has instructed authority to act in the subject-matter of making and fixing rates of transaction, and whose knowledge and purposes may well be attributed to the corporation for which the agents act. While the law should have regard to the rights of all, and to those of corporations no less than those of individuals, *it cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands*, and to give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at." (Emphasis added.)

Ibid. at pp. 495-496.

139 (1904) A.C. 423.

140 *Ibid.* at 426.

> "As for the question, 'utrum universitas delinquere possit [whether corporations can commit crime],' our modern way has been to circumvent it. The real difficulty was to make out how any man, any natural man, could be vicariously liable to pay damages for the wrongful act or negligence of his servant, which he had in no way authorized and might even have expressly forbidden. When this was overcome, the difficulty of ascribing wrongful intention to an artificial person was in truth only a residue of anthropomorphic imagination."[141]

Another example for the application of the doctrine of vicarious liability to the corporation is to be found in Mousell Brothers Ltd. v. London & North-Western Railway Co.[142] In this case, a corporation was charged with giving a false account with intent to avoid payment of railway tolls, which amounted to the violation of Section 98 of the Railways Clauses Consolidation Act 1845. This illegal conduct was actually done by a corporate employee and branch manager. The main point at issue was whether or not the legislative purpose of this statute was aimed at holding a company, as well as an individual principal, liable for its servant's act. Considering the object of the statute, the words used, the nature of the duty laid down, the person upon whom it was imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty was imposed, the court held that the legislative intent of the statute was to impose liability for the prescribed "quasi-criminal act" upon the principal when his servant committed the absolutely forbidden conduct within the scope of his employment.[143] As for an intent to avoid payment, which was necessary to constitute the offence, Atkin J. viewed the intent as that of the servant who "has to deal with the particular matter,"[144] whilst the penalty is imposed upon the owner of the servant. In other words, the principal was held absolutely liable for such quasi-criminal acts of his servant as long as his servant had the required *mens rea*. Once *mens rea* on the part of the principal was considered unnecessary, the court saw no difficulty in holding that a corporation was exactly in the same position as an individual principal.

The same reasoning for the imposition of vicarious liability upon a corporation

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141 Pollock, *supra* note 44 at 235.

142 [1917] 2 K.B. 836.

143 *Per* Lord Reading C.J., *ibid.* at 845.

144 *Per* Atkin J., *ibid.* at 846.

was extended by the court to statutory offences involving proof of mental states. In a notorious case, Moore v. I. Bressler Ltd,[145] the limits of corporate criminal liability were widened in the extreme. A corporation was charged with a violation of Section 35 (2) of the Finance (No. 2) Act 1940 when its two officials, the secretary and general manager of the Nottingham branch and the sales manager of that branch, sold certain goods of the corporation with fraudulent intent to keep proceeds of the sale for themselves. Certain false returns were then made by them in respect of purchase tax on the sales. The corporation was convicted but on appeal to Quarter Sessions the convictions were discharged by the Recorder on the ground that the sales in fraud of the corporation had been made by the officials. The Recorder's decision was later reversed by the Divisional Court. At the Divisional Court, the central issue to be addressed was whether the two corporate officials acted within the scope of the authority of the corporation, rather than whether their conduct was done to benefit the corporation. Lord Caldecote C.J. held:

> "These two men were important officials of the company, and when they made statements and rendered returns which were proved in this case, they were clearly making those statements and giving those returns as the officers of the company, the proper officers to make the returns. Their acts, therefore, ... were the acts of the company."[146]

There had been similar authority before the decision in the Moore case was decided.[147] Nevertheless, commentators have criticised the Moore case for extending the limits of corporate criminal liability too much.[148] In the same year,[149] a corporation was again

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145 [1944] 2 All ER 515.

146 *Ibid.* at 515-516.

147 See, for example, Warrington v. Windhill Industrial Cooperative Society (1918) 82 J.P. 149, and Griffiths v. Studebakers (1924) 1 K.B. 102 (holding that the liability of the employers would not be affected by the fact that the acts of their servant were actually forbidden both by statute and by them). See also Brentnall and Cleland v. L.C.C. [1945] K.B. 115 (holding that the principal would not avoid liability even if he has no control over his servant's act); St. Margaret's Trust Ltd. [1958] 2 All ER 289. For a recent case, see Re Supply of Ready Mixed Concrete [1995] 1 A.C. 456, in which a company was held liable for contempt of court for the act of an employee in making an arrangement in breach of instructions given by the board of directors.

148 See Burrows, *supra* note 18 at 17 ("It is difficult again to apply to such cases the principle that a person is not liable for an agent's or servant's crime unless personally implicated."); Welsh, *supra* note 13 at 360 ("There can be no justification for the Courts to extend to the field of criminal law the doctrine of vicarious liability which was developed in the totally different context of the law of tort."); G. Williams, *Textbook of Criminal Law* (1983, 2nd ed., Stevens & Sons, London), p. 973 ("There is little sense in punishing the company by a fine when the act was directed against

held liable for offences involving *mens rea* in D.P.P. v. Kent & Sussex Contractors Ltd.[150] In this case, a corporation was indicted for a violation of the Defence (General) Regulations 1939, reg. 82, when, for the purpose of obtaining petrol coupons, it sent to the appropriate authority on the prescribed form a fortnightly vehicle record containing a falsification, which was signed by the transport manager. The Glamorgan Justices dismissed the information on the ground that a corporation could not be guilty of the offences involving an act of will or state of mind, which could not be imputed to a corporation. This decision was reversed by a Divisional Court. Although having reached the same conclusion that the corporation was guilty of the offences as charged, each Judge held the different reasons for it. The reasoning of Hellett J. seems to place emphasis on the analogy between corporate vicarious liability for tort and corporate criminal liability for offences involving intention.

> "[T]here has been a development in the attitude of the courts arising from the large part played in modern times by limited liability companies. At one time the existence, and later the extent and conditions of such body's liability in tort was a matter of doubt, due partly to the theoretical difficulty of imputing wrongful acts or omissions to a fictitious person, and it required a long series of decisions to clear up the position. Similarly, the liability of a body corporate for crimes was at one time a matter of doubt, partly owing to the theoretical difficulty of imputing a criminal intention to a fictitious person and partly to technical difficulties of procedure. Procedure has received attention from the legislature, as for instance, in s. 33 of the Criminal Justice Act, 1925, and the theoretical difficulty of imputing criminal intention is no longer felt to the same extent."[151]

What lies at the basis of the reasoning is an analogy between an individual person and

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the company and therefore against the shareholders."); P.J. Richardson, *et al* (eds), *Archbold, Criminal Pleading, Evidence and Practice* (1999 ed., Sweet & Maxwell, London), §17-33 ("[I]t is doubtful whether [it] would now be followed."). The decision in Moore would be reversed by the Law Commission's Draft Criminal Code, Clause 30 (6), which provides that a corporation is not liable for the act of a controlling officer when it is done with the intention of doing harm, or concealing harm done, to the corporation. Law Commission, *A Criminal Code for England and Wales* (1989, Law Commission No. 177, HMSO, London) [hereinafter cited as *A Criminal Code*], notably, Vol. 2 (Commentary on Draft Criminal Code Bill), para. 10.13. For another criticism against the Moore case, see also Gobert, *supra* note 10 at 400. Gobert calls this case "over-inclusive" when it applies to the range of corporate liability. The theoretical issues of the appropriate limits of corporate liability, in particular, the "over and under-inclusiveness" issues will be dealt with in the next chapter.

149 The other case delivered in this year was R. v. I.C.R. Haulage Ltd. [1944] K.B. 551, which will be examined in the next subsection.

150 [1944] K.B. 146, 1 All ER 119.

151 *Per* Hallett, J., [1944] K.B. 146 at 157.

a "corporate" person, both of whom incur statutory duties to furnish honest information in order to obtain petrol coupons. Thus, if a corporation, furnishing dishonest information, was able to escape the liability which would be incurred by an individual employer in a similar case, it would be considered "strange and undesirable."[152] It is clear that this reasoning rendered the corporation vicariously liable for the act and mental states of its transport manager.

The reasoning by McNaghten J. was also concerned with corporate vicarious liability, considering that the issue addressed by him was whether the knowledge of the transport manager regarding the false returns could be imputed to the corporation.

> "[A] body corporate is a "person" to whom, among other attributes which it may possess, there should be imputed that of a mind capable of having knowledge and of forming an intention... It is true that a corporation can only have knowledge and form an intention through its human agents, but circumstances may be such that the knowledge and intention of the agent must be imputed to the body corporate... If the responsible agent of a company, acting within the scope of his authority, puts forward on its behalf a document which he knows to be false and by which he intends to deceive, ...his knowledge and intention must be imputed to the company."[153]

In considering whether the knowledge of the transport manager could be imputed to the corporation, however, this reasoning appears to limit the human agent, whose intent and action should be imputed to the corporation, to "the responsible agent." Whilst any reason why the acts and mental states of such an agent could be imputed to the corporation was neither submitted nor clarified, the difference should be identified in this reasoning between corporate vicarious liability for the act and state of mind of a mere agent and corporate personal liability for the act and intention of the responsible agent. The difference between a mere agent and the responsible agent was more conspicuously mentioned in the reasoning of Caldecote C.J.

> "[T]he real point which we have to decide... is... whether a company is capable of an act of will or a state of mind, so as to be able to form an intention to deceive or to have knowledge of the truth or falsity of a statement.... [A]lthough the directors or general manager of a company are its agents, they are something more. A company is incapable of acting or speaking or even of thinking except in so far as its officers have acted, spoken or thought.... The officers are the company for this purpose... The offences created by the

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152 *Ibid.* at 158.

153 *Per* McNaghten J., *ibid* at 156.

> regulation are those of doing something with intent to deceive or of making a statement known to be false in a material particular. There was ample evidence... that the company, by the only people who could act or speak or think for it had done both these things..."[154]

The Divisional Court's decision in Kent & Sussex was approved in Rex v. I.C.R. Haulage Ltd.,[155] in which the new concept of "the responsible agent" was more strikingly upheld. The appellant company and ten other defendants were charged at Assizes with conspiring to defraud in that they agreed to charge another company for a quantity of goods in excess of that which was in fact delivered. Counsel for the appellants argued that an indictment alleging a common law conspiracy to defraud would not lie against a corporation because it is devoid of forming an intention or act of the will. In addressing the question whether a corporation can be indicted for a conspiracy to defraud, Stable J. denied automatic imputation of a criminal intention in the mind of a servant or agent to a corporate principal, as acknowledged in the case of Mousell.[156] Instead, by relying upon the rule of the responsible agent implied in the case of D.P.P. v. Kent & Sussex Contractors Ltd.,[157] limitations were established as to the type of a corporate agent for whose acts and mental states a corporation was to be held liable.

> "[W]hether the jury are satisfied that it has been proved, must depend on the nature of the charge, the relative position of the officer or agent, and the other relevant facts and circumstances of the case."[158]

In this case, the acts of conspiracy to defraud were done by the managing director of the company, "probably the most important figure in the managerial hierarchy of the limited company,"[159] thus the court was content with regarding his conduct and state of mind as those of the company.[160]

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154 *Per* Caldecote C.J., *ibid.* at 151, 155-156, referred to by Welsh, *supra* note 13 at 357.

155 [1944] KB 551.

156 *Ibid.* at 555-556.

157 *Ibid.* at 556.

158 *Ibid.* at 559.

159 Leigh, *Criminal Liability*, *supra* note 7 at 34.

160 [1944] KB 551 at 559.

As a result of the Haulage case, two propositions were, according to Leonard H. Leigh, clearly established: (1) the distinction made between corporate *personal* and vicarious liability; and (2) the imputation of the acts and mental states of certain agents to the company in the appropriate circumstances.[161] That is to say, apart from cases of strict liability offences, a corporation may be held *personally*, not vicariously, liable for offences involving *mens rea* when a responsible agent, sufficiently high in the corporate hierarchy, is involved in the offence in question. This leads to new questions as to who is the responsible officer and in what circumstances. The next section will examine how the English courts dealt with these questions.

2.5. The Principle of Identification for Corporate Personal Liability

The result of one of the three cases delivered in 1944, the case of I.C.R. Haulage Ltd., can be described as "revolutionary"[162] in the historical development of corporate criminal liability in English law for two reasons. Firstly, it was ruled that a corporation can be held liable for *mens rea* offences. Secondly, the application of the doctrine of vicarious liability was narrowly limited in such cases: a corporation could be held liable for *mens rea* offences only when one of its responsible agents was involved. Whilst a corporation was held liable for the acts of another under the vicarious liability doctrine, the new rule of responsible agent, which is later called "the identification principle," rendered it liable as if it acted by itself. This principle originates from a civil case, Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.[163] A cargo of the respondents, loaded in a steamship of the appellant company, was destroyed by fire during her voyage. In the Court of Appeal it was revealed that the fire and consequent loss of the cargo were caused by unseaworthiness due to the defective condition of her boilers. It was also found that one of the managing owners of the company knew of the defects in the condition of the ship. In interpreting the words "his actual fault or privity"

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161 Leigh, *Criminal Liability*, *supra* note 7 at 34.

162 Welsh, *supra* note 13 at 346.

163 [1915] A.C. 705.

of s. 502 of the Merchant Shipping Act 1894,[164] Lord Haldane ruled in the following passage that his fault was viewed as the company's fault:

> "[A] corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.... [One of the managing owners of the appellant company] took the active part in the management of this ship on behalf of the owners... [H]is action must, unless a corporation is not to be liable at all, have been an action which was the action of the company itself within the meaning of s. 502.... It must be upon the true construction of that section in such a case as the present one that the fault or privity is the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing respondeat superior, but somebody for whom the company is liable because his action is the very action of the company itself."[165]

Although not cited in I.C.R. Haulage Ltd., the Lennard case and the passage mentioned above has been considered the landmark for establishing "the directing mind and will" doctrine in the context of corporate liability,[166] which stemmed from the *alter ego* doctrine in tort.[167] In 1957, the directing mind and will doctrine was also described by Lord Denning in another civil case, H.L. Bolton (Engineering) Co. Ltd. v T.J. Graham & Sons Ltd.[168]

> "A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of

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164 Merchant Shipping Act 1894, s. 502 provides:

> "The owner of a British sea-going ship, or any share therein, shall not be liable to make goods to any extent whatever any loss or damage happening without his actual fault or privity in the following cases; namely -
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> (i.) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship...."

165 [1915] A.C. 705 at pp. 713-714.

166 This is sometimes called the "organic" theory. See Leigh, *Criminal Liability*, *supra* note 7 at 41, n.36.

167 For the formative period of the *alter ego* doctrine in English law, Leigh, *Criminal Liability*, *ibid.* at pp. 97. See also L.H. Leigh, "The Alter Ego of a Company" (1965) 28 *Modern Law Review* 584.

168 [1957] 1 Q.B. 159.

these managers is the state of mind of the company and is treated by the law as such."[169] The *alter ego* doctrine, under which the mental states and conduct of the figure of the directing mind and will of the company is regarded as those of the company, has infiltrated into criminal cases since the 1960s,[170] and the English courts have addressed the question of who constitutes the directing mind and will of the company. In John Henshall (Quarries) Ltd. v. Harvey,[171] a corporation was indicted as an aider and abetter for violations of the Motor Vehicles (Construction and Use) Regulations 1955 and the Road Traffic Act 1960. A weighbridge operator of the defendant corporation weighed an eight-wheeled lorry driven by an independent contractor, and issued a conveyance note showing that the laden weight of the lorry was in excess of the permitted weight prescribed in regulation 68 of the Motor Vehicles (Construction and Use) Regulations 1955. The weighbridge operator was aware of the excess in the permitted weight but in oversight had allowed the independent contractor to drive the lorry away. It was found that he took no part in the general management of the defendant corporation but was employed to weigh the vehicles which were driven onto the weighbridge and to issue a conveyance note for them. Moreover, it was customary for the manager of the defendant corporation to perform periodic checks on the weighing of the vehicles on the weighbridge to see to it that the regulations were complied with. However, neither the manager nor anyone else in the defendant's office was aware that the weighbridge operator had allowed the lorry to be driven away carrying a load in excess of the weight permitted by the Regulations. Pursuant to the precedent that required the master to have actual knowledge of the circumstances which constitute the principal offence,[172] the court considered whose actual knowledge should be identified with that of the defendant corporation regarding the circumstances in which the offence was committed by the independent contractor. In terms of the quotation of the phrase of Lord Denning in

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169 *Ibid.* at 172.

170 For a case in which the distinction between corporate vicarious and personal liability seems to be made in the 1950s, see James and Sons Ltd. v. Smee, [1955] 1 Q.B. 78.

171 [1965] 2 QB 233, 1 All ER 725.

172 The cases quoted by the court are National Coal Board v. Gamble [1959] 1 Q.B. 11, [1958] 3 W.L.R. 434, 3 All ER 203; and Ackroyd's Air Travel Ltd. v. Director of Public Prosecutions [1950] 1 All ER 933.

Bolton, Lord Parker concluded that the weighbridge operator was a mere hand of the company, but the manager, who was not aware that the lorry was allowed to be driven, was the brains of it.

> "There is no doubt that there are many cases where the knowledge of somebody in the position of the brain, maybe the directors, the managing director, the secretary, the responsible officers of the company, has been held to be the knowledge of the company. It seems to me that is a long away from saying that a company is fixed with the knowledge of any servant: again to quote Lord Denning: the knowledge of the hands as opposed to the brain merely because it is the servant's duty to perform that particular task. [Footnote omitted]"[173]

Furthermore, Lord Parker submitted an additional standard for the delegate of the corporate management by the corporation.[174] Under the delegation standard by Lord Parker, there can be cases where the knowledge of a servant is identified with that of his master who completely hands over the effective management of a business. In the case of the corporate master, the corporation cannot escape its responsibility by such delegation, since the knowledge of the delegate is identified with that of the corporation.

The identification of the company with its manager whom the corporate "brains" have delegated full power and discretion of its affairs was also described in Regina v. Stanlay Haulage Ltd.[175] In this case, a road haulage company was charged with conspiracy with its three employees to commit or encourage the commission of breaches of the statutory provisions as to keeping records relating to goods vehicles and the hours of duty of drivers. The question raised was whether a conspiracy of the transport manager of the defendant company, who had a complete discretion to manage, direct and control the corporation's business affairs, was identified with a conspiracy by the company itself. In terms of considerations of his position and managerial capacity, the court held that decisions taken and acted on by those, such as the transport manager in this case, in whom a company vested the power to make managerial decisions without

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173 [1965] 2 Q.B. 233 at 241. A director of the company had been considered to be a typical figure whose knowledge was identified with the company. Thus, a corporation could not held liable for conspiracy with its sole director, for his knowledge, necessary for the company to conspire, was already imputed to the company. See Regina v. McDonnell [1965] 1 Q.B. 233.

174 [1965] 2 Q.B. 233 at 241, referring to Vane v. Yiannopoullos [1964] 2 Q.B. 739, 2 W.L.R. 1335.

175 [1964] *Criminal Law Review* 221.

further reference, were regarded as decisions of the company.

The rule of "the power to make managerial decisions without further reference" mentioned above was applied in Magna Plant Ltd. v. Mitchell.[176] The defendant company's depot engineer was convicted of breach of reg. 73 (1) of the Motor Vehicles (Construction and Use) Regulation 1963. He repaired a car of the hirer and signed a certificate that it was roadworthy, but some parts of the car were not maintained in the condition that the regulation required. As for the liability of the corporation, however, the court denied the identification of the defendant company with the depot manager to whom the company had handed over its responsibility, for he was not considered to be in the position of being part of the "brains" of the company.

In the 1970s, the issue of who should be identified with the corporation was dealt in detail with in Tesco Supermarkets Ltd. v. Nattrass.[177] In this famous case, a company, which owned hundreds of supermarkets, was charged with a violation of Section 20 (1) of the Trade Descriptions Act 1968. Soap powders at the Northwich branch store of the company were offered at a price less than they were in fact listed, thereby amounting to violation of Section 11 (2) of the Act. It was revealed that the branch manager, who was responsible for display of the poster and the items advertised, had to remove any display notices if he was informed by his assistant that any special offer stock was sold out. His assistant, whose duty was to replenish the soap powder shelves, discovered that no packs of the soap powder for the special offer remained on display. Having filled the soap powder shelves with packets of the soap powder, each of which was marked with the normal price, she did not report the shortage of the goods or her action to the manager. Consequently, during the display of the poster for the special offer, packs of the soap powder marked with the normal price were on display. It was also alleged that the manager failed both to check the soap powder on the shelves and to instruct or supervise his assistant.

According to Section 24 (1) of the Act, it was a defence for the defendant to

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176 [1966] *Criminal Law Review* 394.

177 [1971] 2 All ER 127, [1972] AC 153.

prove "(a) that the commission of the offence was due to.... the act or default of *another person*, ..." and "(b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence." Since the defendant company raised this defence,[178] the main points at issue considered by the court were whether or not the branch manager was *another person* prescribed in Section 24(1)(a) and whether or not the defendant took all reasonable precautions and exercised all due diligence to prevent the branch manager from committing the offence as prescribed in Section 24(1)(b).

The Magistrate's Court, the Queen's Bench Divisional Court and the House of Lords delivered different decisions. The Magistrate's Court held that the defendant company "had exercised all due diligence in deciding a proper system for the operation of the store and by securing so far as was reasonably practical that it was fully implemented and thus had fulfilled the requirements of Section 24(1)(b)." Since the manager represented the defendant company in his supervisory capacity, however, he was not considered to be "another person" prescribed in Section 24(1)(a). Accordingly, his failure to instruct or supervise the assistant was regarded as preventing the defendant company from establishing the defence provided by the Section 24. The defendant company was fined and subsequently appealed.

The conviction was upheld by the Divisional Court,[179] but the reasoning for the conviction was different. Fisher J., by referring to Section 20 of the Act,[180] ruled that

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178 The reasonable precautions and due diligence alleged to be taken and exercised by the defendant company were: providing a properly equipped store; properly selecting the manager to manage it; providing a proper detailed and adequate system and instructions as to how such system and the store were to be operated; providing adequate and proper supervision to see that the defendants' system was followed and their instructions observed. [1972] A.C. 153 at 160. It was the practice in the grocery trade for all stores to be under the immediate instruction of a shop manager. The ladder of responsibility from the manager upwards was: the manager - the branch inspector - the area controller- the regional director - the board of directors. *Ibid.* at 158.

179 [1971] 1 Q.B. 133.

180 Section 20(1) of the Trade Descriptions Act 1968 provides:

> "(1) Where no offence under this Act which has been committed by a body corporate is proved to have been committed with the consent and connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly...."

the manager in this case could not be included in the word "manager" which appeared in Section 20, and therefore fell into the category of the word "another person" of Section 24(1)(a).[181] In addition, Fisher J. interpreted the meaning of the taking of precautions and the exercise of due diligence as: (1) the setting up of an efficient system for the avoidance of offences under the Act; and (2) the proper operation of that system.[182] As found in this case, Fisher J. observed that the second part, the operation of the system, would have to be delegated by the company to employees falling outside those mentioned in Section 20. Inevitably, if the manager, to whom the defendant company had delegated its duty to take all reasonable precautions and exercise all due diligence to avoid the commission of such an offence, failed properly to carry out that duty, the company would be held responsible for his negligent operation of the system and thus fail to establish the defence of Section 24(1)(b). In this manner, the Divisional Court dismissed the appeal.

In the House of Lords, the conviction was quashed unanimously. To sum up, the two issues whether the manager falls into the category of "another person" provided in Section 24(1)(a) and whether the company had exercised all due diligence were dealt with in the following ways:

(1) The branch manager of the company, which owned hundreds of shops, was not in a position to manage the affairs of the company nor embody the company's directing mind and will, centre ego and brains and, thus, would not be identified with the company. As a result, he fell with the category of "another person" provided in Section 24(1)(a).

(2) In order to fulfill the requirements of the defence that appeared in Section 24(1)(b), the company had established the efficient system to avoid the commission of the offence under Section 11(2), and, in terms of its branch inspectors and area controllers' regular attendance to supervise the shop managers and the operation of shops, properly operated that system. This kind of duty to avoid the commission of the offence by employees and

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181 [1971] 1 Q.B. 133 at pp. 142-143.

182 *Ibid.* at pp. 143-144.

to secure their observance of instructions could not be delegated to or fulfilled by the manager, namely, another person who was not identified with the company. Therefore, even if the contravention of Section 11(1) was due to the act or default of the manager of the store in question, there was no failure on the part of the company's system. The defence provided in Section 24(1)(b) should thus apply in this case in the defendant company's favour.

There are several principles established in dicta of this well-known case. The first to note is the theoretical basis for corporate criminal liability. With reference to the famous phrase advanced by Lord Denning in Bolton, Lord Reid differentiates corporate personal liability from its vicarious liability by holding that:

> "A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company."[183]

Under the identification principle quoted above, the person who speaks and acts as the company or, to borrow Lord Pearson' phrase, who is the company's "directing mind and will, its centre and ego, and its brains,"[184] is identified with the company.

The scope of persons who can be identified with the company was also clarified in this case. In addressing this issue, the Divisional Court, as well as the House of Lords, referred to and cited the word "any director, manager, secretary or other similar officer of the body corporate", which appears in Section 20(1) of the Act. Nevertheless, more specific and substantial standards for the identification were suggested by the House of Lords. Lord Reid, for example, ruled that "the board of directors may delegate some part of their functions of management, giving to their delegate full discretion to act independently of instructions from them," and "within the scope of the delegation

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183 *Per* Lord Reid, in [1972] A.C. 153 at 171.

184 *Per* Lord Pearson, in *ibid.* at 190.

he can act as the company."[185] Viscount Dilhorne also held that "a person who is in actual control of the operations of a company or part of them and who is not responsible to another person in the company for the manner in which he discharges his duties in the sense of being under his orders, cannot be regarded as "another person" within the meaning of sections 23 and 24(1)(a)",[186] but can be identified with the company. Thus, the standards for the identification displayed in this case do not depend on the title of a person's post in the corporation, but on whether the person is in full control of the operations of the company or part of them, or whether the person had been delegated by the board of directors full discretion to act independently of its instructions.

The final point to bear in mind is whether the manager's supervisory fault concerning his assistant's negligence nullify the company's due diligence defence provided in Section 24(1)(b). As described earlier, the Divisional Court considered that the company's duty to take precautions and exercise diligence was delegated to the manager of a particular store who failed to supervise his assistant, and that his fault prevented the company from completing its duty necessary for such a defence.[187] However, the House of Lords, in particular, Lord Morris, denied any possibility of the delegation of the company's duty to exercise due diligence to "another person."[188] By comparing his status in the company to "a cog in the machine which was devised," Lord Morris ruled that:

> If the company had taken all reasonable precautions and exercised all due diligence to ensure that the machine could and should run effectively then some breakdown due to some action or failure on the part of "another person" ought not to be attributed to the company or to be regarded as the action or failure of the company itself for which the company was to be criminally responsible. The defence provided by section 24 (1) would otherwise be illusory."[189]

That is to say, the distinction between corporate *personal* liability and corporate

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185 *Per* Lord Reid, in *ibid.* at 171.

186 *Per* Viscount Dilhorne, *ibid.* at 187.

187 [1971] 1 Q.B. 133 at pp. 145-146.

188 *Per* Lord Morris of Borth-y-Gest, [1972] A.C. 153 at 180.

189 *Ibid.* at 181.

vicarious liability was adhered to by the House of Lords in relation to the interpretation of Section 24 of the Act. As long as the company itself, or the board of directors who were identified with the company, took all precautions and exercised due diligence, the act or default by another person (servants or agents) would not affect the establishment of the defence provided by Section 24(1)(b).[190]

Before turning to a brief examination of criticisms against the identification principle in the 1970s, it may be helpful to note some other points as to this principle itself. The first point lies in Lord Reid's dictum.[191] After considering "the nature of the personality which by fiction the law attributes to a corporation," he goes on to say that "It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent."[192] Consequently, the judge should direct the jury that they must find that the act and intention of the person who had the relevant status and authority are those of the company itself. It does not suffice to instruct that the natural person in question is a "responsible agent" or "high executive," since not every such person can be identified with the company.[193]

The second point to note relates to the requirement of "the scope of the controlling officer's employment." Under the identification principle, a company is held liable for those acts of the director or controlling officer that are carried out within the

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190 See also *per* Lord Pearson, in *ibid.* at pp. 192-193.

191 *Supra* text accompanying note 183.

192 [1972] A.C. 153 at 170. See also Law Commission, *A Criminal Code*, *supra* note 148, Clause 30(3)(c), which provides that "Whether a person acting in a particular capacity is a controlling officer is a question of law."

193 Rex v. Sporle [1971] *Criminal Law Review* 706 at 707. See also Reg. v. Andrews-Weatherfoil Ltd. [1972] 1 W.L.R. 118 at 124, in which Eveleigh J. held that:

> "It is not every "responsible agent" or "high executive" or "manager of the housing department" or "agent acting on behalf of a company" who can by his actions make the company criminally responsible. It is necessary to establish whether the natural person or persons in question have the status and authority which in law makes their acts in the matter under consideration the acts of the company so that the natural person is to be treated as the company itself. It is often a difficult question to decide whether or not the person concerned is in a sufficiently responsible position to involve the company in liability for the acts in question according to the law as laid down by the authorities."

scope of his employment. It is thus the director or controlling officer, not the company, who is held liable for acts done outside the scope of his employment.[194] It is also required to prove that the director or controlling officer, whose conduct constitutes the offence, was acting in his capacity on behalf of the company at the relevant time.[195]

The final point to note is concerned with the requisite *mens rea*. Where the offence with which a company is charged requires *mens rea*, it is a controlling officer who should have the *mens rea* in order for the company to be held liable for the offence.[196] Where a company has available to it a defence which requires proof of mental states such as a belief, it is also the controlling officer who should have such a state of mind. In an Australian case, G.J. Coles & Coy Ltd. v. Goldsworthy,[197] a company was charged with a violation of Sections 220 and 233(1) of Health Act 1911 for selling contaminated food which was manufactured and packaged by a third party. The food became contaminated without knowledge or fault of the company or any practical method of inspection available to the company. The company appealed pleading honest and reasonable but mistaken belief pursuant to Section 24 of the Criminal Code.[198] The question addressed by the court was how to establish the belief

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194 See, for example, International Sales and Agencies Ltd. v. Marcus [1982] 3 All ER 551; G.R. Sullivan, "Company Controllers, Company Cheques and Theft" [1983] *Criminal Law Review* 512 at pp. 519. G. Williams takes a similar view that:

> "[I]t can be argued that identification applies only in respect of acts done on company business, not in the manager's private concerns, and that it applies only in respect of acts done in a managerial or directorial capacity."

Supra note 148 at 974

195 *Per* Stuart-Smith, L.J. in Rex v. Dovermoss Ltd. (1995) 159 JP 448 at 456.

196 Law Commission, *Criminal Code*, *supra* note 148, Clause 30(2); Tesco Supermarkets Ltd. v. Nattrass [1972] A.C. 153.

197 [1985] WAR 183. J.C. Smith cites another Australian case, Brambles Holdings Ltd. v. Carey [1976] 15 S.A.S.R. 270, for the situations where the belief of one is incongruous with that of another who is superior to the first and knows that belief is ill founded. Smith, *supra* note 12 at 187. Yet, this Australian case is of more significance for the theory of aggregation or the collective knowledge doctrine than for the issue of corporate defence. The theory of aggregation will be analysed in Chapters 4 and 5.

198 Section 24 of the Criminal Code provides:

> "A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist...."

of the corporation. By referring to the Tesco case,[199] Burt C.J. held that the belief of the company might entail "the belief of the directors"of that company or "the person to whom the directors had delegated the function of management relative to the detection of contamination of products being manufactured for the appellant [company] by independent manufacturers."[200]

It must be stressed that the three points noted above are all related to criticism made just before and after the Tesco case was decided. The criticism that will be examined in the next and final section in this chapter is based on the difficulty of distinguishing between corporate primary liability and its vicarious liability, and still remains unresolved at the present time.

2.6. The Criticism of the Identification Principle

The early bars to corporate criminal liability which had appeared since the Middle Ages have gradually been removed by the English courts. Most stemmed from corporate incapacity to do something which individual offenders were expected by law to do in order to incur criminal liability: to do positive acts; to entertain culpable mental states; to give command or consent; to appear at trial; and to suffer physical punishment such as imprisonment. The way the bars, both procedural and substantive, were removed should not be viewed as "overcome" as described by Leonard H. Leigh. Since the requirements of personal appearance, *actus reus* and *mens rea* were technically considered by the court at the level of individual agents in the context of corporate liability, it is fair to say that the bars were virtually evaded[201] or circumvented.[202]

It is two principles in tort that are borrowed by the court to establish corporate criminal liability: the doctrines of *respondeat superior* and the *alter ego*, both of which are now utilised on different occasions. In English law, a company is to be held

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199 *Per* Lord Reid, in [1972] A.C. 153 at 171, considered in *supra* note 185.

200 *Per* Burt C.J., in [1985] WAR 183 at 188.

201 *Per* Coleridge J., in R. v. Mayor etc. of Manchester [1857] 119 E.R. 1317 (7 E & B 453-456), cited in *supra* note 31.

202 Pollock, *supra* note 44 at 235, cited in *supra* note 141.

vicariously liable for strict liability offences, and *personally* liable for offences involving *mens rea*.[203] The scope of the application of both doctrines, the vicarious liability doctrine and the identification principle, has been subject to criticism.[204] The most problematic issue is how to draw a clear line between two cases: a case in which vicarious liability should be imposed on a company and a case in which the identification principle should be applied. A good place to start is to examine several criticisms against the Tesco case, which have been made since the case was decided.

It has been suggested that the establishment and adoption of the identification principle in the Tesco case restricts the scope of corporate liability in two ways. Firstly, the liability of corporations is based solely on the successful location of the guilty controlling officers in the corporate hierarchy.[205] Secondly and more importantly here, the identification principle, rather than the doctrine of vicarious liability, *may* apply in the case of violations of consumer protection statutes such as the Trade Descriptions Act 1968, which may not be thought of as truly criminal.[206] Thus, the application of the identification principle in such regulatory offences would be favourable to employers whose statutory duties are to supervise and ascertain that their employees do not violate the relevant regulations. By discharging such duties into a system of control and presenting an adequate "paper" system to the court in preparation for a due diligence defence, the company, as well as its officers, could expect to escape liability on proof of the lower employee's fault.[207] One of the critical points in the Tesco case lies in the

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203 Law Commission, *A Criminal Code*, *supra* note 148, Clause 30 (1) and (2).

204 Criticism against the derivative and anthropomorphic nature of these doctrines will be examined in the next chapter.

205 As suggested in *supra* note 12, the identification doctrine is restricted version of that of vicarious liability. See G.R. Sullivan, "The Attribution of Culpability to Limited Companies" (1996) 55 *Cambridge Law Journal* 515 at 518.

206 I.A. Muir, "Tesco Supermarkets, Corporate Liability and Fault" (1973) 5 *New Zealand Universities law Review* 357 at 366. See also W.B. Fisse, "Consumer Protection and Corporate Criminal responsibility" (1971) 4 *Adelaide Law Review* 113 at pp. 118-119.

207 Muir, *ibid.* at 367. He goes on to say that "the deterrent effect on corporations of this sort of regulatory enactment may well be diminished." *Ibid.* Tesco Ltd. established a satisfactory system of control summarised in *supra* note 178. Nevertheless, there might be room for doubt as to whether it motivated their servants to comply with it. On this point, see R.W.L. Howells, "A Blow against Enterprise Liability" (1971) 34 *Modern Law Review* 676 at 680.

fact that no elaborative attempt was made by their Lordships to distinguish between "public welfare offences and true crimes"[208] for the application of the identification principle. Nor was an account given for the replacement of the vicarious liability doctrine with the identification principle in cases of public welfare offences.

The confusion of which doctrines should apply in such offences took place again in Tesco Stores Ltd. v. Brent London Borough Council.[209] Tesco Ltd. supplied a video recording to a 14-year-old boy who had not attained the age specified in the classification certificate, contrary to Section 11(1) of the Video recordings Act 1984. Under Section 11(2)(b) of this Act, it was a defence to a charge under Section 11(1) that the defendant neither knew nor had reasonable grounds to believe that the person concerned had not attained the relevant age. In this case, the cashier indeed had reasonable grounds to believe that the video film was supplied to a person under the age of 18. The question raised was whether the company, despite such reasonable grounds of its employee, would avail itself of this defence. If the rule of "directing mind and will" established in Tesco in 1971 was applied in this case, the same defendant company would escape liability with resort to this defence because the reasonable grounds of the cashier could not be identified with those of the company. Nonetheless, Staughton L.J. rejected such defence on the part of the defendant company, by ruling that :

> "I see no reason why [Section 11(2) of the Act] should necessarily have the same meaning as that laid down in *Tesco Supermarkets v. Nattrass*. The language here draws no distinction between [the company or those who are its directing mind and will] and those under [the control of the directing mind and will]. The content is concerned with knowledge and information, not due diligence. It is.... absurd to suppose that those who manage a vast company would have any knowledge or any information as to the age of a casual purchaser of a video film. It is the employee that sells the film at the check-out point who will have knowledge or reasonable grounds for belief. It is her knowledge or reasonable grounds that are relevant. Were it otherwise, the statute would be wholly ineffective in the case of a large company, unless by the merest chance a youthful purchaser were known to the board of directors."[210]

It is obvious that the reasonable grounds of the cashier were imputed to the

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208 Howells, *ibid.*

209 [1993] 2 All ER 718; 1 W.L.R. 1037. See also C. Wells, "Corporate Liability and Consumer Protection: Tesco v. Nattrass Revisited" (1994) 57 *Modern Law Review* 817.

210 [1993] 2 All ER 718 at 721, 1 W.L.R. 1037 at 1042.

company and, hence, that the company was held *vicariously*, not *personally*, liable for its employee's conduct and mental states. The consistent application of the doctrine of vicarious liability to the cases of violations of consumer protection statutes or, in the broader sense, public welfare offences, may be one of the alternative solutions to the problem of confusion mentioned above. Adherence to the doctrine of vicarious liability, not to the identification principle, in the area of public welfare offences is also found in some academic literature. Professor John Andrews, for example, proposes that corporations should only be held liable: (1) "for any offence occasioned by failure to fulfill the obligations which are specially imposed by virtue of any activity the corporation engages in;" and (2) "for such acts committed by its servants or some other person as a private individual standing in the same position to such servant or other person would be liable."[211] Andrews also suggests the availability of a due diligence defence as follows:

> "[*T*]*he corporation can evade liability by showing that the responsibility for the offence lay with a particular identified person or persons and that it was not occasioned or assisted by any lack of diligence elsewhere in the organisation or by any other employees or by any practice or by any organisational structure or by any control in any part of the organisation falling below the standard which is reasonably to be expected in corporations carrying on such activities.*"[212]

Another problem of ambiguity between vicarious liability and identification can be observed in Professor Glanville Williams' suggestions.[213] In addressing the issue of a questionable line drawn in the Tesco case between a small company with two retail shops which can easily be identified with branch managers and a giant company with hundreds of shops whose directing mind and will can only be located at the headquarters, Williams has proposed to extend the identification principle to cover the

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211 J. Andrews, "Reform in the Law of Corporate Liability" [1973] *Criminal Law Review* 91 at 97. G.R. Sullivan also argues for the doctrine of vicarious liability in criticising such organisation theories as Fisse's Reactive Corporate Fault Model. Sullivan, *supra* note 205. Since the organisation theory as to the appropriate model of corporate liability is analysed in Chapter 4, Sullivan's suggestions are accordingly considered therein.

212 *Ibid.* Andrews' proposal is based on his observations both of the difficulty of proving guilt of the particular or identified controlling officer (*ibid.* at 93), and of the likelihood of the prospect of corporate conviction in the consumer field (*ibid.* at 94).

213 G. Williams, *Textbook of Criminal Law* (1983, 2nd ed., Stevens & Sons, London), p. 973.

persons in control of local branches.[214] His suggestions are based on the practical effect of the Tesco case that the identification principle confines the basis for corporate liability to "the behaviour of a few men meeting even when the activities of the corporation are country-wide or world-wide."[215]

The scope of the identification principle was indeed extended to cover the figure of middle management in the corporate hierarchy in an appeal case from New Zealand, Meridian Global Funds Management Asia Ltd. v. Securities Commission.[216] In this case, an investment manager of the defendant company used funds managed by the company to acquire shares in a public issuer with the company's authority, which was unknown to the board of directors and managing director. The company thus became for a short period a substantial security holder in that public issuer, but did not give notice as required by Section 20(3) of the Securities Amendment Act 1988. It was apparent that the investment manager would not fall into the category of "directing mind and will" under the identification principle ruled in the Tesco case. In addressing the classic question of "[w]hose act (or knowledge, or state of mind) was intended to count as the act etc. of the company," Lord Hoffman, however, seems to establish a new rule that "the court must fashion a special rule of attribution for the particular substantive rule."[217] In other words, the question of whose act and state of mind can be deemed to those of the company is one of construction rather than of metaphysics, and, thus, depends on how the policy of the statute at issue should be interpreted.[218] By considering the purpose of Section 20 of the Securities Amendment Act 1988 to be "to

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214 *Ibid.*

215 *Ibid.* Williams goes on to say that:

> "It is an offences of negligence that the limitation of liability imposed in *Tesco* is most injurious. That a company should not be liable for an offence of negligence committed by its branch manager, who after all represents the company in the particular locality, is a considerable defect in the law.... What is evidently needed is a statutory redefinition of the offences whose acts and mental states implicate the company." (Footnote omitted.)

Ibid.

216 [1995] 2 A.C. 500, 3 W.L.R. 413.

217 [1995] 3 W.L.R. 413 at 419.

218 *Ibid.* at 423.

compel, in fast-moving markets, the immediate disclosure of the identity of persons who become substantial security holders in public issuers," Lord Hoffman concluded that the person who, with the authority of the company, acquired the relevant interest and whom the company allowed to do so on their behalf is relevant for corporate liability.[219] For the purpose of this rule, the acts and knowledge of the investment manager were imputed to the company.[220]

It seems reasonable to say that this extended version of the identification principle, although considered to be welcomed to some degree by some commentators,[221] would blur the distinction between corporate *personal* liability and its *vicarious* liability. This is particularly evident in cases in which the delegation of certain power in relation to corporate business is involved. Under the *original* identification principle, a company is held liable for the acts of those to whom the board of directors or controlling officer had delegated full power in the running of its affairs.[222] Likewise, the company is to be held *vicariously* liable for its lower employee's violative acts under the delegation principle.[223] On the one hand, under the delegation principle, which has primarily developed through liquor licensing cases,[224] a licensee, for example, is to be held vicariously liable for the violative acts of the delegate to whom he had

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219 *Ibid.* It should be noted that the question of whose act and mental state can be regarded as those of the company was also addressed through the interpretation of the statute in question in the case of Tesco Brent, *per* Staughton L.J. *Supra* note 210. See also Regina v. British Steel Plc. [1995] I.C.R. 586, in which it was held that the application of the identification doctrine would be denied and absolute liability should be imposed on the defendant company as to Section 3 of the Health and Safety at Work etc. Act 1974. Ibid. at 593. Detailed facts and arguments of this case will be examined in the next chapter.

220 Little attention was paid by Lord Hoffman to the fact that the investment manager in this case did not give required notice because he did not want his employers to find out. *Ibid.*

221 See, for example, C.M.V. Clarkson, "Corporate Culpability" (1998) 2 *Web Journal of Current Legal Issues*; J. Gobert, "Corporate Criminality: Penal Sanctions and Beyond" (1998) 2 *Web Journal of Current Legal Issues*.

222 Regina v. Stanlay Haulage Ltd. [1964] *Criminal Law Review* 221, cited in *supra* note 175; and Magna Plant Ltd. v. Mitchell [1966] *Criminal Law Review* 394, cited in *supra* note 176.

223 For a general account of the delegation principle in the vicarious liability doctrine, see, for example, J.C. Smith, *supra* note 12 at pp. 176-179; P.J. Pace, "Delegation - A Doctrine in Search of a Definition" [1982] *Criminal Law Review* 627.

224 See, for example, Vane v. Yiannopoullus [1965] A.C. 486.

delegated his duties and responsibilities. Although the delegate is given a power to control certain aspects of business affairs and a discretion in the manner of its exercise, it is the delegator or employer who is held liable as a principal whilst his delegate or employee is as an abettor.[225]

On the other hand, on the criteria of identification, account would be taken by the jury of the requisite *mens rea* and the nature of the relevant status and authority, rather than the mere title of the post, of the controlling officers or the delegate who was given the independent authority by the controlling officers.[226] Central to corporate *personal* liability is not, therefore, a question of who is the directing mind and will of the company, but whether the delegate completed or failed to complete his delegated tasks.[227] Considering that a failure of the delegate to perform his delegated task given by the board of directors is imputed to the company anyway, the metaphysical concept of the directing mind and will would become of secondary significance.[228] As a result, whether one should call this "imputation" or "identification" would be a matter of semantics, and the basic or structural distinction between vicarious liability and identification would be a matter of degree.[229] Unless proper interpretation of the purpose and policy of the applicable statute is made by the court, the blurred distinction between vicarious liability and identification would enable the court to impose criminal liability on a corporation on the basis of the unstable notion of the directing mind and

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225 J.C. Smith, *supra* note 12 at p. 181.

226 See *supra* text accompanying notes 191-200. See also The Law Commission, Working Paper No. 44, *Second Programme, Codification of the Criminal Law: General Principles, Criminal Liability of Corporations* (1972, HMSO, London), in particular, pp. 25. In its effort to provide a greater measure of certainty as to the identification doctrine, the Law Commission once made a provisional proposal for the delegation principle by offering the following four conditions: (1) the functions of management delegated should be substantial; (2) the delegation of functions must be a relevant part of the corporation's activities; (3) the activity of the individual identified with the company is done within the scope of the authority conferred upon him; and (4) one of the controlling officers has the whole mental element required for the offence.

227 Leigh, *A Comparative View*, *supra* note 1 at pp. 1514-1515.

228 Lederman, *supra* note 8 at 297.

229 Leigh, *Criminal Liability*, *supra* note 7 at p. 83.

will, whose acts and mental states "it is desired to ascribe to the company."[230]

In conclusion, several observations in this subsection have shown that the extended version of identification doctrine in current trends of English case law is likely to lead to ambiguity in the distinction between corporate *personal* liability and *vicarious* liability. How to distinguish between the two doctrines in their application remains to be tested by the courts. These observations themselves are, however, preliminary to further questions as to the theoretical basis of both doctrines, which will be dealt with in the next chapter. Added to their application, both doctrines carry conceptual deficiencies in capturing corporate fault, notably when considered in the context of the liability of corporations for manslaughter. In Chapter 3, the emphasis will be placed on the reexamination of the theoretical basis for the identification principle and the vicarious liability doctrine in cases of corporate manslaughter.

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230 *Ibid.* at 124. See also Fisse, *supra* note 12 at 205.

CHAPTER 3

MANSLAUGHTER AND ANTHROPOMORPHIC MODELS OF CORPORATE LIABILITY

3.1. Introduction

In the previous chapter, two questions were raised concerning the doctrine of corporate criminal liability in English law. The first question was how the doctrine has been made compatible with the traditional criminal law aimed at the individual offender in the history of English law. By tracing the history of the development of corporate criminal liability, it was revealed that the English court dealt with corporate liability in terms of putting a company in a position analogous to that of an individual employer. When such an employer was considered to incur responsibility either for his failure to maintain the public facility or for the acts of his employee, the court saw no reason why corporations could not take the same position of responsibility in cases where the business was done in the corporate name. It was also made clear that two parallel liability models, an individual master's vicarious liability for his servants' tort and the liability of quasi-municipal corporations to maintain and repair the public facility, which had developed concurrently for certain periods, contributed to the court's reasoning.[1]

The second question raised was whether the theoretical principles behind corporate liability were justifiable. Two tort principles have been incorporated by the English court to hold a company criminally liable: the doctrine of vicarious liability and the principle of identification. The differences between the two principles are practical and conceptual. The doctrine of vicarious liability is applied when a company is to be held liable for strict liability offences, while the identification principle is applicable to *mens rea* offences. In the former case, the company is to be held vicariously liable for the acts of its employees. In the latter case, it is to be held personally liable as if it acted by itself.

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[1] Chapter 2, text accompanying note 111.

Both principles utilise a common concept to hold a company liable; namely, the imputation of the acts and mental states of the actual offender. Under the principle of identification, the actual offender is limited to the directing mind and will of the company, or to the delegate to whom the board of directors had delegated full power in the running of corporate affairs. On the other hand, the doctrine of vicarious liability allows the acts of any corporate personnel to be imputed to the company. As examined in the previous chapter, since the scope of the actual offender under the identification principle is extended by the court to cover the middle management in the corporate hierarchy, a clear distinction between the two principles is not only difficult to draw but also of secondary importance.

The core of these two questions addressed in the previous chapter can be reduced to corporate incapacity to do criminal conduct, to entertain mental states and to suffer criminal penalties. In other words, the two tort principles have been borrowed by the court in order to evade or circumvent an issue of how to apply human concepts, such as *actus reus* and *mens rea*, to the corporate offender.[2] Before turning to a closer examination of this issue, one more question should be raised concerning the theoretical structures of the vicarious liability doctrine and the identification principle.[3] It was demonstrated in Chapter 2 that a clear line between both doctrines has been so obsucured that which doctrine should be applied is determined on a case-by-case basis. This is one of the flaws from which they suffer concerning their application. When applied to several corporate manslaughter cases, which will be described later,[4] they both carry more serious theoretical flaws.

It is the main purpose of this chapter to define these theoretical problems. In the

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2 Chapter 2, text accompanying notes 9-10.

3 The main issue of how to apply the human concepts of *actus reus* and *mens rea* to corporate liability for manslaughter will thus be dealt with in Chapter 5.

4 There have been four corporate manslaughter cases brought to trial in English law: Cory Brothers Co. [1927] 1 K.B. 810; Northern Stripping Mining Construction Ltd. (unreported) (1965) *The Times* 2, 4 and 5 February; P & O European Ferries (Dover) Ltd. (1991) 93 Cr. App. R. 72; Kite and OLL Ltd. (unreported), *The Times* and *The Independent*, 9 December 1994.

P & O case,[5] for instance, it was first acknowledged in English law that the identification principle can be applied to corporate liability for manslaughter. Whilst the court addressed fundamental theoretical issues in the way that might help to extend the scope of the application of the identification principle further, its resolution of the issues provides limited value as legal precedent. In the following sections, two theoretical issues of continuing significance will be addressed.

The first issue is concerned with the application of the identification principle to the case of corporate manslaughter: is this principle still tenable in the context of manslaughter? Since the P & O case, legal questions seem to be changed: from whether a company can be held liable for manslaughter to how the conviction of corporate manslaughter can be gained easily.[6] However, the issue of corporate manslaughter to be addressed here is under what theories corporations can properly be held liable. In rebutting the rationales for the identification principle, Sections 3.2 and 3.3 of this chapter raises an objection to applying the identification principle to corporate manslaughter cases.

The second issue involves the theoretical basis for the doctrine of vicarious liability widely used in the American jurisdictions for corporate homicide:[7] is this an acceptable alternative to the identification principle in the case of corporate manslaughter in English law? In adopting the extended version of the identification principle, as analysed in the previous chapter,[8] a clear distinction between corporate direct liability and corporate vicarious liability has lost its significance in English law, particularly concerning their application. It has thus been argued that effective law enforcement aimed at the deterrent effect against corporate manslaughter and incapacity

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5 *Per* Turner J., in P & O European Ferries (Dover) Ltd (1991) 93 Cr. App. R. 72 at 88-89.

6 See, for example, E. Colvin, "Corporate Personality and Criminal Liability" (1995) 6 *Criminal Law Forum* 1 at 18.

7 In the US., increasing attention has been paid to the issue of corporate homicide since State v. Ford Motor Co. (commonly referred to as the "Pinto case") was delivered. See, in general, M.B. Clinard & P.C. Yeager, *Corporate Crime* (1980, The Free Press, New York); F.T. Cullen, W.J. Maakestad & G. Cavender, *Corporate Crime under Attack* (1987, Anderson Publishing Co., Ohio).

8 See Chapter 2, Section 2.6.

of corporations to exhibit the culpability for the offence without the concept of imputation of at least one individual's mental states support the conclusion that a recurrence to a long familiar principle, namely, the vicarious liability doctrine, will be the appropriate solution to the issue of corporate manslaughter.[9] After Section 3.4 examines the existing criticism against the vicarious liability doctrine (*i.e.* the over- and under-inclusive aspects of this doctrine), Section 3.5 responds to the arguments in favour of identification and vicarious liability by suggesting that recourse to individual guilt would overlook the primary aspect of corporate liability - the *collective nature* of criminal responsibility.

In total, eighteen cases of corporate manslaughter under English, American and Australian laws are described in the subsequent sections so as to illustrate various flaws of both doctrines and to emphasise the need for a better understanding of the *collective* nature of corporate liability. Focus is placed on the factual backgrounds of the cases, rather than on the reasoning and judgments by the courts, so that several important questions as to how deaths of victims were caused by corporations, for what type of corporate fault corporations should have been blamed, and why both doctrines failed to capture the corporate fault can be raised specifically in the context of corporate manslaughter. Based on the analysis of several cases, it is concluded that the constituent elements of corporate manslaughter should not be captured through the anthropomorphic concept of imputation of individual conduct and mental states, but should be established on the organisational basis.

3.2. The Principle of Identification and Corporate Manslaughter

The most significant characteristics of the identification principle lie in its attempt to compare the corporate structure to a human body. In H.L.Bolton (Engineering) Co. Ltd. v. T.J. Graham & Sons Ltd.,[10] Lord Denning developed the notion of "the directing mind and will." Under this notion, a company is held liable on the following two occasions:

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9 See, in particular, G.R. Sullivan, "Expressing Corporate Guilt" (1995) 15 *Oxford Journal of Legal Studies* 282 at 291 and "The Attribution of Culpability to Limited Companies" (1996) 55 *Cambridge Law Journal* 515 [hereinafter cited as *Attribution*] at pp. 539-546.

10 [1957] 1 Q.B. 159, cited in Chapter 2, text accompanying notes 168-169.

when the company's "hands", namely, mere servants or agents, commit a crime in accordance with directions from the nerve centre and brain (the controlling officers); or when at least one of the controlling officers himself or herself commits the crime except that his or her conduct is against the company's interest.[11] As far as corporate manslaughter is concerned, it is unlikely that one of the controlling officers actually performs a positive act of manslaughter. However, if his/her failure or omission is considered by law to cause the victim's death, it is possible that the company is held liable as a principal.

On the other hand, the company is to be held liable as an accessory to the principal crime committed by an employee, when the controlling officer is involved in the principal crime.[12] In such a case, whether this employee has the requisite *mens rea* for his or her conduct, therefore, does not affect the liability of the corporation. What is important to corporate liability is how the controlling officer is involved in the principal offence of manslaughter. The means of his or her involvement can be divided into: (1) the procurement, assistance, or encouragement of the principal and (2) the failure to prevent the acts of the principal.[13] The following English case serves as a typical example of the former type of involvement.

Case 1 (Cory Brothers Ltd.[14])

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11 See Moore v. I. Bressler Ltd. [1944] 2 All ER 515, cited in Chapter 2, text accompanying notes 145-146.

12 See Law Commission, *A Criminal Code for England and Wales* (1989, Law Com. No. 177) [hereinafter cited as *A Criminal Code*], Clause 30 (2)(b), (4) and (5).

13 Law Commission, *A Criminal Code*, *ibid.*, Clause 30 (4). More than seventy years ago, the type of corporate liability was exquisitely categorised by Winn into the following three: (1) liability for the acts of a person which are merely performances of *direct* commands from the board of primary representatives; (2) that for the acts done entirely on the initiative and sole discretion of the actor or merely within a *general* scope of authority; and (3) that for the unauthorised acts of the person. C.R.N. Winn, "The Criminal Responsibility of Corporations" (1929) 3 *Cambridge Law Journal* 398 at pp. 408-409. According to Winn, corporate liability is to be denied in the third case. In addition, the liability of corporations in the second case is deemed vicarious and, thus, is also to be denied in the case of manslaughter. Winn limits the scope of corporate liability for manslaughter to the first case.

14 [1927] 1 K.B. 810. It is not surprising that the defendant company was acquitted in this case, given that the concept of corporate liability for *mens rea* offences was not fully established in English law at that time. See Chapter 2, Sections 2.4 and 2.5. Threrefore, stress here is upon factual backgrounds of this case which are drawn from *The Times*, 11 January and 1 March, 1927,

On 24 August, 1926, an engineer of a colliery company was instructed by the chief electric engineer, shift manager and power engineer of the company, to put up a "live" wire fence around a power house belonging to the company, for the purpose of protecting the bunkers against pilfering. The fence in question was erected merely as a precaution against trespassers, but it was more accurately described as a barbarous device for catching intruders and preventing their escape.[15]

Half an hour later, several young ex-colliers went on a ratting expedition, having dogs and a ferret with them. Having worked the river, they reached the tip opposite the power house about 8.00 p.m. When one of the dogs chased a rat down the railway line and into the coal bunkers, two of the lads were on the part of the tip, and followed their dogs. When they got through the electric fence, they were unscathed although they must have touched the strands of the fence.

While the two lads were on the colliery premises, following the dogs, a whistle, like a police one, was sounded, which appeared to come from the power house. When seeing a shift engineer of the company, the two lads ran away. One of them, the victim of this case, made a dash for the electric wire. Just as the shift engineer, who was chasing the boy, got near, the boy slipped on a corrugated iron sheet lying near the electric fence, and fell face forward, grabbing one of the wires with his right hand. The boy appeared to be driven back with the shock, kept on wriggling, and finally collapsed on the fence. The shift engineer tried to pick up the boy by catching hold of the back of his coat, but even though he did not touch the boy's body he received a slight shock. Realising that nothing could be done, he dashed away to the power house to switch off the current.

The current entered the boy's body by the right hand and passed out by the left hand, taking a direction across the chest, which was most dangerous because of the effect on the heart. Moreover, the wet state of the boy's clothing due to the rain would be conductive to electrification. The witness of the incident had no idea that there were electrified wires on the premises.

On 10 January, 1927, three engineers (= corporate officials)[16] and the colliery company were prosecuted for manslaughter of the victim. The summonses alleged that the defendants "set or caused to be set a man trap or other engine calculated to destroy human life or inflict grievous bodily harm... upon the trespasser or other person coming in contact with it."

Through his comment on this case, Winn expounded detailed rationales for the liability of corporations for the decisions made by what he called "the board of primary

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rather than on the court's reasoning against corporate liability for manslaughter. For the factual backgrounds of this case, see also C. Wells, *Corporations and Criminal Responsibility* (1993, Oxford Press) [hereinafter cited as *Corporations*], p. 101.

15 The fence consisted of three stands of copper wire supported by insulators attached to pit prop driven into the ground. The copper stands, ideal conductors of electricity, were connected with a powerful switchboard inside the power house. The current of the fence was switched on at 5.30 p.m. The voltage was allegedly 110 volts. *The Times*, 11 January 1927, p. 11.

16 They were at the eating house two nights before the fatality discussing the pilfering of coal from the bunkers, and one of them said: - "We will put to a stop to this. We will put something up and I'll switch on the juice and let some of these - get it in the neck." These expert electrical engineers knew full well what conditions might lead to electrification. *The Times*, 11 January 1927, p. 11.

representatives" of the company. In their corporate capacity, according to Winn, the directors or primary representatives usually exercise the powers of the corporation vested in them as its controllers. As individuals, when nine persons of similar opinions "unite to prove to a tenth the infallibility of their position, each will be strengthened, confirmed and rendered more obdurate by the support of the others."[17] In this process of mutual influence and stimulation unique to groups or associations, they can "go to excesses from which alone they would have shrunk."[18] Thus, emphasis should be placed upon such "an inexplicable but plainly demonstratable phenomenon of the human mind in groups"[19] when it was applied in the case of manslaughter of the colliery company described above. The engineers of the company, "who would each and all have shrunk from erecting on their own land such a barbarous man-trap,"[20] could reach the decision of erecting on the corporate premises a live electrical wire fence *in their directorial capacity under mutual influence*. Viewed in this light, the company should not be held vicariously liable for the inferior engineer's conduct in erecting the fence which was the originating cause of the victim's death, but it should be as an accessory for officers' command to the inferior engineer to do so.

Under the identification principle, on the other hand, a company is to be held liable as an accessory for manslaughter: (1) when one of its controlling officers fails to prevent the acts of the servant which lead to the victim's death; or (2) when s/he fails to take steps to prevent the occurrence of the victim's death.[21] In the former, fault of the controlling officer is explained as a failure to supervise her/his inferior employees in

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17 Winn, *supra* note 13 at 406.

18 *Ibid.* A similar explanation is given by Ashworth that:

> "The argument is .... that the behaviour of individuals is often shaped by their relationships to groups and collectivities .... The thrust is that companies can acquire a momentum and a dynamic of their own which temporarily transcend the actions of their officers."

A. Ashworth, *Principles of Criminal Law* (1995, 2nd ed., Oxford University Press), p. 115.

19 Winn, *supra* note 13 at 406.

20 Winn, *ibid.*

21 In the case of strict liability offences, there may be a due diligence defence that is available to the defendant. Both categories would be considered to be some factors for existence or non-existence of a due diligence defence on the part of the defendant.

order not to perform a criminal act. In the latter, the immediate cause of death is not the result of human action, but rather the source of risk. Strictly speaking, there may be certain intermediate persons between the source of risk and the criminal consequences: namely, the lower-level employees who are in the closest position to the source of risk. Nonetheless, it would be more appropriate for two reasons to ascribe the *legal* cause of the consequences to a failure of the controlling officer than to the mere employee's conduct regarding the source of risk. Firstly, the employee close to the source of risk is not likely to have the requisite *mens rea* for manslaughter. Rather, s/he should be considered to perform as an innocent agent through whose conduct the failure of the controlling officer to avoid the risk leads to the fatal consequences. Secondly, there are several cases in which the employees were killed by the source of risk. The following Australian case provides a good example.

Case 2 (The Queen v Denbo Pty. Ltd.[22])

> On 14 June 1994, an Australian company pleaded guilty to manslaughter in the Supreme Court of Victoria. In this case, the company carried on business as an earth moving contractor. In February 1991, a truck accident took place on the construction site due to the truck's grossly defective brakes. The driver of the truck was killed. As the employer of the victim, the company was held responsible for the victim's death on the grounds that it failed "to establish an adequate system of maintenance for its plant and vehicles," "to properly train its employees," and "[permitted the truck at issue] to be put into use without proper maintenance." Teague J. emphasised the fact that the company placed higher priority on working the trucks than on the safety of workers. By plea of guilty, the defendant company acknowledged criminal negligence.
>
> In the same proceedings, the individual officer (the owner) of the company also pleaded guilty to two breaches of the provisions of the Occupational Health and Safety Act 1985 (Victoria). The particulars were that he failed as an officer of the company to maintain a safe working environment for employees of the company. Of this defendant, Teague J. stated as follows:
>
> > "[He] acknowledged that he had been given and had accepted the responsibility within the company for the maintenance of vehicles and the training of its employees as part of the company's duty to provide and maintain a safe working environment for its employees. However, he did not act responsibly. He was aware of the poor state of the brakes on [the] trucks but he directed that they be used. Moreover, the training which he gave the deceased and the other truck drivers was quite inadequate. There was willful neglect in the terms of s52 of the Occupational Health and Safety Act."

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22 Unreported, 14 June 1994, Supreme Court of Victoria, Teague J. I am indebted to the Supreme Court library of Victoria for supplying this case.

Teague J. based his reasoning for corporate liability upon the individual officer's violations of the relevant statute (the Occupational Health and Safety Act 1985, Victoria). It is obvious that in this case the fault element on the part of the defendant company was, under the identification principle, derived from the officer's failure to "maintain a safe working environment for employees of the company." Teague J. enumerated several facts constituting corporate fault, which included failures to "establish an adequate system of maintenance for its plant and vehicles," "to properly train its employees," and permitting the truck at issue "to be put into use without proper maintenance." Considering that the source of risk in this case was the truck's grossly defective brakes, the immediate cause of the truck driver's death should be determined by the officer's failure to maintain an adequate system of maintenance for the truck at issue, with the result that the truck was permitted to be used.

There was no fault on the part of the truck driver; if any, the defendant company should not be held vicariously liable for his fault partly because he was the victim, but mainly because his fault resulted from the controlling officer's failure to "properly train" him. Another example as to the identification of the controlling officers' failure with the company's fault is illustrated in the following case.

Case 3 (People v. Ebasco Services, Inc.[23])

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[23] (1974) 354 N.Y.S. 2d. 807. In the US., the position and status of the particular corporate agents are irrelevant to imposing liability on corporations, as the vicarious liability doctrine is widely accepted. Nevertheless, several American corporate homicide cases will be referred to in the following sections with the assumption that these cases were decided under the identification principle in English law.

For a general discussion of American corporate homicide cases, see, in general, P.B. Rodella, "Corporate Criminal Liability for Homicide: Has the Fiction been Extended too Far?" (1984) 4 *Journal of Law and Commerce* 95; S.J. Wragg, "Corporate Homicide: Will Michigan Follow Suit?" (1984) 62 *University of Detroit Law Review* 66; J.P. Grogin, "Corporations Can Kill Too: After *Film Recovery*, Are Individuals Accountable for Corporate Crimes?" (1986) 19 *Loyola of Los Angeles Law Review* 1411; D.v. Ebers, "The Application of Criminal Homicide Statutes to Work-Related Deaths: *Mens Rea* and Deterrence" (1986) 86 *University of Illinois Law Review* 969; V.L. Swigert & R.A. Farrell, "Corporate Homicide: Definitional Processes in the Creation of Deviance" (1980) 15 *Law and Society Review* 161; G.A. Clark, "Corporate Homicide: A New Assault on Corporate Decision-Making" (1979) 54 *Notre Dame* Lawyer 911; J.M. Hickey, "Corporate Criminal Liability for Homicide: The Controversy Flames Anew" (1981) *California Western Law Review* 465; A.L. Helverson, "Can a Corporation Commit a Murder?" (1986) 64 *Washington University Law Quarterly* 967; G.L. Mangum, "Murder in the Workplace: Criminal Prosecution v. Regulatory Enforcement" (1988) 39 *Labor Law Journal* 220; S.R. Weinfeld, "Criminal Liability of Corporate Managers for Deaths of their Employees: *People v. Warner-Lambert Co.*" (1982) 46 *Albany Law Review* 655; K.M. Koprowicz, "Corporate Criminall Liability

> A corporation had been hired by a public utility to perform certain management, construction and engineering functions in connection with a $200 million extension to an electrical generating station on the East River. A portion of the extension project involved the construction of a cofferdam, a temporary metal boxlike structure submerged in the waters of the East River so that water could be pumped out in order for workmen to descend to the river bottom to construct certain permanent facilities for the overall project. The fieldwork was under the supervision of the corporation's executive vice president and several supervisors. On 17 August 1973, a portion of the cofferdam collapsed during assembly and two workmen drowned. The corporation was charged with criminally negligent homicide, by failing to properly construct and supervise construction of a cofferdam, and by failing to perceive a substantial and unjustifiable risk of death in the construction of the cofferdam, in a manner which constituted a gross deviation from the standard of care that a reasonable person would observe in the situation.

Whilst the immediate cause of collapse of the cofferdam is unknown from the case report, corporate fault is clearly identified; namely, several officers' supervisory fault in that they failed to "properly construct and supervise construction of a cofferdam" and "to perceive a substantial and unjustifiable risk of death" of two workmen during construction. Nevertheless, there may be room for further analysis as to what kind of risk they failed to perceive.

This case would have a similar aspect of corporate fault, as is found in the Denbo case (*Case 2*), if the officers failed to perceive the immediate cause of collapse. On the other hand, it would be possible to capture corporate fault in this case in terms of the officers' failure to organise a safety system for the construction of the cofferdam in order to prevent the source of risk from leading to disaster. Usually, corporate business

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for Workplace Hazards: A Visible Option for Enforcing Workplace Safety" (1986) 52 *Brooklyn Law Review* 183; D.J. Miester Jr., "Criminal Liability for Corporations that Kill" (1990) 64 *Tulane Law Review* 919; J.E. Stoner, "Corporate Criminal Liability for Homicide: Can the Criminal Law Control Corporate Behavior?" (1985) 38 *Southwestern Law Journal* 1275; S.A. Radin, "Corporate Criminal Liability for Employee-Endangering Activities" (1983) 18 *Columbia Journal of Law and Social Problems* 39; J.C. Magnuson & G.C. Leviton, "Policy Considerations in Corporate Criminal Prosecutions after *People v. Film Recovery System Inc.*" (1987) 62 *Notre Dame Law Journal* 913; K.F. Brickey, "Death in the Workplace: Corporate Liability for Criminal Homicide" (1987) 2 *Notre Dame Journal of Ethics and Public Policy* 753; L.C. Anderson, "Corporate Criminal Liability for Specific Intent Crimes and Offenses of Criminal Negligence - The Direction of Texas Law" (1984) 15 *St. Mary's Law Journal* 231; J. Uffelman, "Corporate Criminal Liability in Oregon: State v. Pacific Powder and the New Oregon Criminal Code" (1972) 51 *Oregon Law Review* 587; E.S. Hochstedler, "Criminal Law, Prosecutions, and Blameworthiness of Corporations for Crimes against Life, Health and Safety in the United States" (1992) 9 *Nihon University Comparative Law* 165; D.S. Anderson; "Corporate Homicide; The Stark Realities of Artificial Beings and Legal Fictions" (1981) 8 *Pepperdine Law Review* 367.

For this case, see, for example, Rodella, *ibid.* at 101; Wragg, *ibid.* at 73; Grogin, *ibid.* at 1420; Clark, *ibid.* at 916; Hickey, *ibid.* at 480; D.S. Anderson, *ibid.* at 403; Helverson, *ibid.* at 973; Miester, *ibid.* at 926; Stoner, *ibid.* at 1280; Radin, *ibid.* at 48.

involving construction, production or transportation entails some risks to the health and life of people involved in its activity: workers, customers or even the general public.[24] Therefore, it is a company's duty not only to reduce the probability of the source of risk materialising, but also to prevent the source of risk from causing the prohibited consequences, even after it comes to the surface. The following case serves as an example of corporate failure to organise a safety system.

Case 4 (Kite, Stoddart & OLL Ltd.[25])

> On 22 March, 1993, four school children drowned when, on an activity holiday at the Lyme Regis Challenge centre which was organised and operated by a company (OLL Limited), their kayaks foundered during an "ill-conceived and poorly executed canoe trip." After a talk from the centre's manager about safety arrangement and only one hour of basic canoe training in a swimming pool, 23 children and two teachers from Southway Comprehensive School, Plymouth, split into two groups and took the so-called "assault course." The canoe instructors had only recently attended a basic skill course themselves.
>
> On the day of the trip, eight children opted to go canoeing, the instructors did not know the weather forecast was for force 3-4 winds. In addition, several pieces of necessary or emergency equipment were not provided by the centre. The children were not equipped with gloves, footwear, headwear or distress flares. Although given wetsuits and life jackets, they were instructed by one of the instructors not to inflate the latter, which was considered to be the single most important factor leading to the subsequent children's death. Neither of the instructors had flares or a two-way radio. The only safety equipment carried by one of the instructors was a whistle.
>
> The first signs of trouble appeared soon after they launched when one of their kayaks capsized. The teenagers linked their drifting canoes into a raft, but one by one their crafts were swamped by mounting seas, and they all ended up in the water. The students' canoes did not have spray decks to keep the water out, while the instructors and teacher's kayaks did. Without a spray deck, a canoe was "a boat with a great big hole in it."

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24 Interestingly, it is analysed by Schrager and Short that the company can cause health and safety risks in the following three manners: (1) by creating occupational harm to the workers; (2) by selling the defective goods and services to consumers and customers; and (3) by deteriorating the environment affecting the general public. L.S. Schrager & J.F. Short, "Toward a Sociology of Organizational Crime" (1978) 125 *Social Problems* 407 at pp. 413-416. See also W.A. Spurgeon & T.P. Fagan, "Criminal Liability for Life-Endangering Corporate Conduct" (1981) 72 *Journal of Criminal Law and Criminology* 400 at pp. 401-405.

25 Winchester Crown Court, 8 December 1994, unreported. The facts are drawn from *The Times* and *The Independent*, 9 December, 1994. See also A. Ridley & L. Dunford, "Corporate Killing - Legislating for Unlawful Death" (1997) 26 *Industrial Law Journal* 99 [hereinafter cited as *Killing*] at pp. 102-103; and ""No Soul to be Dammed, No Body to be Kicked": Responsibility, Blame and Corporate Punishment" (1996) 24 *International Journal of the Sociology of Law* 1 [hereinafter cited as *Responsibility*] at 1; C.M.V. Clarkson, "Kicking Corporate Bodies and Damning Their Souls" (1996) 59 *Modern Law Review* 557 [hereinafter cited as *Kicking*] at 561.

When the centre's manager realised that there had been no sign of the canoes, he, instead of raising the alarm, initiated his own search in a vain attempt to look for them for vital hours. The local coastguards, who were given no prior details about the trip, were finally notified approximately three hours after the group was expected back.

Several factors were considered to be critical in bringing charges against the three defendants (the company itself, its managing director and the centre's manager) with manslaughter.[26] First, there was no or little liaison between the layers of management at the centre, or between management and staff.[27] Secondly, there were no specific recruitment criteria to become an instructor at the centre,[28] which easily enabled the inexperienced instructors to take a group of novice canoeists across the bay. Finally, the facts described above, such as the lack of safety equipment, the ignorance of emergency procedures among employees, and delays in raising the alarm and directing the search for the group, were deemed to contribute to the deaths.[29]

In this case, the source of risk to the victims is inherent in the defendant company's operations of the canoe trip. The capsize of kayaks would even be a great adventure to the students if they were safely rescued. If the company, however, fails to organise a safe and secure operation of the trip, it becomes highly probable that the source of risk will endagner their lives. The likelihood of the occurrence of the calamity was increased by several factors comprising corporate fault in this case: incorrect instructions by the inexperienced instructors included in the canoe trip; the lack of safety and emergency equipment; and the managing director's indifference to the risks resulting from the trip operations under the above circumstances.

This case involves a mixture of the controlling officer's fault, such as failures properly to train his employees, failures to perceive the source of risk, and failures to

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26 The centre's manager, who had denied four manslaughter charges, was eventually acquitted on the direction of the judge when the jury at Winchester Crown Court failed to reach a verdict after deliberating for 9 and a half hours. *The Times*, 9 December 1994.

27 "The staff who led the expedition could not remember being instructed about emergency equipment." *The Times*, *ibid.*

28 "Candidates had to fill in a form listing their qualifications, and one of the instructors who led the trip had ticked "expert" in a number of activities in which he had only basic experience." *The Times*, *ibid.* The other instructor was not sure if she "was familiar with what an emergency was." *Ibid.*

29 It was also discovered that nine months before the disaster, two employees had quit as instructors after just five weeks at the centre because of fear. Their letter was sent to the managing director, telling him to take a "careful look" at safety, otherwise he might find himself explaining "why someone's son or daughter will not be coming home." This fact was considered part of his breach of a duty of care to those who took part in the outdoor leisure activities. See G. Forlin & M. Appleby, "Corporate Manslaughter by Gross Negligence" (1998) *Practical Research Papers - Crime - Offences - Homicide* (Sweet & Maxwell), p.4.

organise a safe system for the company's adventurous operations of the canoe trip. The idea of the failure to organise a safe system would be instrumental in cases where a company is charged with endangerment crimes. Unlike crimes of murder or manslaughter, the result of the victim's death is not required for the crimes of endangerment to be realised.[30] In the following two cases, the corporations were charged with this type of crime, based on the failure to provide a safe workplace or to operate the ship in a safe manner.

Case 5 (People v. Chicago Magnet Wire Co.[31])

> A wire-coating corporation and its five officials were indicted for aggravated battery and reckless conduct. At the plant, wire was coated with various substances and chemical compounds, some of which were toxic. However, 42 employees did not work in an adequately ventilated area. Neither were they informed of the substances nor provided with protective clothing and gear.
>
> The prosecution alleged that the defendant company and its individual officials, while acting in their official capacity, exposed 42 employees to numerous federally regulated "poisonous and stupefying" substances in the workplace; failed to provide necessary safety instructions and equipment and health monitoring systems in the workplace; improperly stored the substances, and provided inadequate ventilation in the workplace and maintained dangerously overheated working conditions while the employees were exposed to the substances. It was thus alleged that as a result of these acts, the defendants violated their duty to provide a safe workplace for employees and caused great bodily harm to 42 employees with the conscious awareness that a substantial probability existed that their acts would cause great bodily harm. The prosecution also charged that the defendants knowingly committed acts which would cause 42 employees to take by deception, and for other than medical purposes, the substances.
>
> The reckless conduct charges alleged that the defendants grossly deviated from the standard of care which a reasonable employer would exercise in conducting the business of coating wire and thereby violated their duty to provide a safe workplace.

Case 6 (Seaboard Offshore Ltd. v. Secretary of State for Transport[32])

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30 Examples of the crimes of endangerment are found in: Aviation and Maritime Security Act 1990, ss. 1, 11 and 12; Firearms Act 1968, s. 16; Explosive Substances Act 1883, s. 2; Offences against the Person Act 1861, ss. 32-34; Channel Tunnel (Security) Order 1994 (S.I. 1994 No. 570), art. 7; Criminal Damage Act 1971, s.1(2)(b). See also Shillito v. Thompson (1875) 1 Q.B.D. 12.

31 (1987) 510 N.E. 2d. 1173; (1989) 534 N.E. 2d. 962. See also Mangum, *supra* note 23 at 222, Hochstedler, *supra* note 23 at 170.

32 [1994] 1 WLR 541; 2 All ER 99. See also C. Wells, "Corporate Liability for Crime: The Neglected Question" (1995) 14 *International Banking and Financial Law* 42 at 43. For a discusion of the liability of ship's masters, see generally S.W. Taylor, "Criminal Liability of Ship's Masters" (1981) *Lloyds Maritime and Commercial Law Quarterly* 499.

In September 1990, the motor vessel, managed by the defendant company, set sail from the River Tyne, bound for Aberdeen. The chief engineer of the vessel, who had 27 years' experience, had boarded the ship two hours and 50 minutes before she put to sea. Early in the morning of 7 September, the main engines and the generators broke down so that the ship was plunged into darkness. Even the engine room emergency lighting failed to come on. The breakdown was due to an incorrect gravity feed disc which had been fitted to the fuel oil purifier, causing the throughput to the service tanks to inadequately meet the engine demand. The chief engineer managed to restart the engine twice by hand-pumping fuel into the service tanks, and thought that the setting and service tanks were almost empty. Then, he opened a valve on one of the bunker tanks which had the effect of releasing its contents directly into the starboard service tanks, instead of through the settling tank. Consequently, the engines were flooded by water, and the ship came to a halt and remained drifting in the North Sea from the evening of 7 September until 11.00 hours on 8 September, when she was towed back to the River Tyne.

The defendant company was charged with a contravention of section 31 of the Merchant Shipping Act 1988, which provides that "if the owner of a ship to which the section applies fails to discharge the duty imposed on him by sub-s (1) he shall be guilty of an offence.[33] The Justices found that the defendant company had caused the ship to be operated in an unsafe manner by allowing the chief engineer insufficient time to familiarise himself with the ship before it sailed, but made no finding as to who gave the instruction to sail. By rejecting the Justices' view that the defendant should be held vicariously liable for the fault of some employee of the defendants other than the senior management, the House of Lords applied the principle of identification to this case, with the result that the company's conviction was quashed.

The main difference between the above two cases is whether the prosecution succeeded in proving that the controlling officer was involved in life-endangering conduct with which the defendant company was charged. In the Chicago Magnet case (*Case 5*), several corporate officers were blamed for the breach of their duty to provide a safe workplace for their employees, which resulted in recklessly exposing them to poisonous substances in the workplace. In the Seaboard Offshore case (*Case 6*), on the other hand, the prosecution did not or failed to prove who gave the instruction to put to sea when the chief engineer had insufficient time to familiarise himself with the ship. The prosecution's thought was that fault of the chief engineer should be imputed to the defendant company, since they misinterpreted the Act 1988 as imposing vicarious liability. Given that the prosecution proved that the instruction to sail was given by the senior management, the company could have been held liable under the identification principle. In such a case, the company's fault would consist of the senior management's decision to sail, which should be considered part of the breach of their duty to secure

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[33] Subsection (1) of the Act 1988 provides:

" It shall be the duty of the owner of a ship to which this section applies to take all reasonable steps to secure that the ship is operated in a safe manner."

that the ship is operated in a safe manner.

3.3. The Problematic Aspects of the Identification Principle

The previous section surveyed several cases in which corporations were or could have been held liable for manslaughter (or for personal injuries in the cases of Chicago Magnet and Seaboard Offshore) under the identification principle. It has been pointed out by several commentators,[34] however, that this principle suffers some flaws. The flaws, according to these commentators, flow from its scope. Yet, the identification principle is also over-inclusive, since it has been applied to the case where the acts of the controlling officer were against the company's interest.[35] On the other hand, it is under-inclusive[36] if the fault of one of the controlling officers cannot be proved. This is likely to happen in cases of large complex-structured companies where complicated division of authority and accountability makes it almost impossible for the prosecution even to pinpoint whose fault contributes to the criminal consequences.

According to Clarkson, the under-inclusiveness of the identification principle results from its failure to "reflect modern corporate practice" or "the reality of modern corporate decision-making which is often the product of corporate policies and procedures rather than individual decisions."[37] In other words, it is with the company

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34 See, for example, J. Gobert, "Corporate Criminality: Four Models of Fault" (1994) 14 *Legal Studies* 393 at pp. 401-401; C.M.V. Clarkson, *Kicking*, *supra* note 25 at pp. 561-562; E. Colvin, *supra* note 6 at pp. 14-15.

35 Gobert (*ibid.* at 400) refers to Moore v. Bresler [1944] 2 All ER 515, cited in Chapter 2, text accompanying notes 145-146.

36 The terms "over- and under-inclusive" originate from criticisms by several American commentators against the doctrine of vicarious liability. The issues of over- and under-inclusiveness of the vicarious liability doctrine will be analysed in the next section.

37 Clarkson, *Kicking*, *supra* note 25 at 561. Commentators have been united in their belief that the identification doctrine is still effective when applied in the cases of small owner-managed companies, as found in the Kite & OLL case (*Case 4*), in which it is not difficult to prove the controlling officer's fault. See, for example, Clarkson, *Kicking*, *ibid.* See also B. Fisse & J. Braithwaite, *Corporations, Crime and Accountability* (1993, Cambridge University Press), p.1, n.1, stating that:

> "Our central concern is the position in relation to *large-scale* business enterprises and governmental entities." (emphasis added)

If these commentators are correct, the theory of corporate liability might arbitrarily be determined by the ability or inability of the prosecution to pinpoint the individual offenders in the corporate setting. Just because the identification principle does not work in the case of large-scale

itself, not with specific individuals that the corporate fault lay in the sense that corporate policies and operational procedures did not ensure that the result would not occur.[38]

Unfortunately, these criticisms of over- and under-inclusiveness suffer *petitio principii*, a fallacy in reasoning in that they base their justification upon an assumption, the adequacy of which needs first to be proved. The assumption is that the concept of "corporate policies and practices" would cover the *ideal* scope of corporate fault and liability. As far as the over-inclusive aspect of the identification principle is concerned, a company would not, as in the Moore case, be held liable for the act of the senior officer which was against the company's interest, at least under the Law Commission's Criminal Code Bill, Clause 30 (6).[39] Thus, the over-inclusiveness issue could be avoided even under the identification principle if a proper consideration is given to its application.[40] Since the adequacy of the corporate policy approach will be examined in the next chapter, the rest of this section will be devoted to the issue of under-inclusiveness of the identification principle in the context of corporate manslaughter.

The identification principle has been considered to be under-inclusive in situations in which corporations unfairly escaped criminal liability. As for corporate liability for manslaughter, several cases are described below.

Case 7 (Northern Stripping Mining Constructions Ltd.[41])

On 5 July, 1964, a welder burner was drowned when a railway bridge which the defendant

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companies, it does not necessarily mean that it is justifiable in the context of small companies.

38 See also C.M.V. Clarkson, "Corporate Culpability" (1998) 2 *Web Journal of Current Legal Issues* [hereinafter cited as *Culpability*]. Those who criticise the identification principle for its under-inclusiveness support, without exception, the corporate policy or culture approach, one of the organisation theories which will be critically analysed in the next chapter. See, for example, Clarkson, *Kicking, supra* note 25 at pp. 569-572 and *Culpability, ibid*; Gobert, *supra* note 34 at pp. 407-409; Colvin, *supra* note 6 at pp. 23-42.

39 Law Commission, *A Criminal Code, supra* note 12. Clause 30 (6) of the Bill provides:
"A controlling officer does not act "within the scope of his office" if he acts with the intention of doing harm or of concealing harm done by him or another to the corporation."

40 This does not mean, however, that this thesis' position is in favour of the identification principle in the case of corporate manslaughter.

41 Unreported. The facts are drawn from *The Times*, 2, 4 and 5 February, 1965.

construction company was demolishing at Boughrood, Radnorshire, collapsed and threw men working on it into the Wye. The company was charged with unlawfully killing the victim.

The prosecution alleged that the foreman, in charge of demolishing a railway bridge, was given oral instructions by the managing director to start in the middle. The foreman was not skilled in any particular trade although he had driven tractors. The only experience he had in the demolition of bridges was in connection with two others which the company demolished in the previous five weeks. He had no appreciation of the dangers involved in demolishing work and as far as he was concerned, it did not matter how a bridge was demolished. He explained to his men what had to be done and then left for another bridge, leaving no one in charge of the work. On the other hand, the managing director had said he would visit the bridge on the following Monday. From Thursday until Saturday when the bridge collapsed, the managing director never put in an appearance.

On Sunday morning the foreman instructed the workmen to burn down a 5-foot Section in the middle of the bridge and then a 10-foot Section further away. As soon as this was done there was a compression force pulling it towards the centre. He instructed the burners further to cut "V" pieces. One of the workmen was engaged in doing so when the bridge collapsed. Instructions given to the foremen to start in the middle were, according to the allegation by the prosecution, almost as ludicrous as telling a man sitting on a branch of a tree to saw the branch. It destroyed the whole stability of the bridge. The obvious way to start demolishing the bridge was to cut at both ends simultaneously.

At trial, however, the foreman admitted that it was possible that he made a mistake and that he construed the managing director's instructions to cut the top bracings in the middle as implying cutting the top cord. To cut a bridge in the middle, standing on the bridge was suicidal, and the following collapse of the bridge should have been foreseen by any mechanical engineer. Therefore, there might have been some doubt about him getting the instructions right. As a matter of fact, the managing director, who gave the foreman oral instructions, insisted at trial that he told the foreman to start from the ends of the bridge, leaving the upstream girder intact. This means that they would start by cutting the top cord in 5 feet lengths to start 10 feet from the end, and work towards the middle, not start in the middle of the bridge. As a result, the foreman's conduct was regarded as contrary to the managing director's instructions, and the company was acquitted.

The company in this case escaped liability despite its managing director's involvement in the demolishion operation at issue. This was because his fault could not be proved as to the foreman's misunderstanding of his instructions, which led to the catastrophe. Under the identification principle, if one of the controlling officers (as in this case, the managing director) was certainly not at fault to the extent of showing reckless disregard for the life of the victim who drowned, the company could not be guilty for reckless manslaughter.[42]

If the doctrine of vicarious liability was applied to this case, as seen in the

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42 *Supra* note 36.

American jurisdictions, the company would be held vicariously liable for the act of the foreman. Nonetheless, in this case, the company's fault should not be captured by way of the imputation of the unskilful, inexperienced foreman's mistake. Neither should the company's fault be comprised of managing director's failure properly to supervise the process of demolishing the bridge on the construction site. Rather, the company should be to blame for putting the foreman in charge of the work, without giving him proper training or experience in demolishing bridges prior to the tragedy.

This case provides a typical flaw of the identification principle, under which corporate liability depends upon the particular individual's fault: that is, if no one is at fault, the company can escape liability even when there may still be room for assessing corporate *collective* fault. The next American case, in which the company itself pleaded *nolo contendere* to the homicide charge but its senior officer escaped liability due to the causation issue, also illustrates the flaw of the identification principle. If this case had been decided in English Law, the identification principle would have been applied and the result would have been the company's acquittal. The main point at issue here is how the senior officer was exempted from liability although his fault was clearly identified. The detailed facts of this case are described below.

Case 8 (State v. Serebin[43])

> After Midnight on 7 February, 1976, a nursing home resident (seventy-eight years old) walked out of the nursing home into the freezing air of the Wisconsin night. He died of exposure to the cold between midnight and 3.00 a.m., when the temperature was between 8° and 15°F. His body was found near the facility, after the morning shift discovered that he was missing. When he left the facility, there were only two aids and one nurse on duty for 200 residents on three floors.
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> In late 1978, six defendants - the corporation itself, the three primary directors of the corporation, and two nursing home administrators employed by the corporation - were charged with homicide by reckless conduct for the victim's death (and with 58 counts of criminal neglect of nursing residents for the skin deterioration, bedsores and weight loss caused by inadequate food and care).
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> Because the corporation itself pleaded no contest to the homicide and neglect

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[43] (1983) 338 N.W. 2d. 855; (1984) 350 N.W. 2d. 65. See also J. Pray, "*State v. Serebin*: Causation and the Criminal Liability of Nursing Home Administrators" (1986) *Wisconsin Law Review* 339; Hochstedler, *supra* note 23 at pp. 168-169; C.B. Schdson, A.P. Onellion & E. Hochstedler, "Nailing an Omelet to the Wall: Prosecuting Nursing Home Homicide" in E. Hochstedler (ed.), *Corporations as Criminals* (1984, Sage Publications, Beverly Hills), pp. 131.

charges, on appeal the issue centred upon whether the individual defendants (in particular, one of the nursing home administrators, Serebin) could be guilty of reckless conduct for the death of the victim. The evidence submitted by the state indicated several factors constituting Serebin's reckless conduct. At the time of the victim's death, Serebin, as the officially designated administrator, was responsible for the day-to-day operation of the nursing home and supervised the care and treatment of the residents through the licensed personnel. He discussed the staffing patterns for the different shifts on the various units with directors of nursing, who submitted staffing plans to him. In reviewing their staffing plans for feasibility, however, Serebin's main concern was operating within the budget. During the winter of 1975-76, he continued to admit patients and reduced the nursing staff further, even if it would make it impossible for the rest of nurses and aides to care for and supervise patients, especially those who had a tendency to wander around and try to leave the building.[44]

On the night of the victim's death, 200 patients were housed in three units. The overnight staff consisted of one nurse for three units and two aides working part of the victim's unit. Before the staff cuts, one nurse was responsible for only two of the three units (including the victim's unit), and three aides working exclusively on the victim's unit. One of the aides assisted the victim to his room at 11:40 p.m., but did not see him get into bed. Later in the evening, she looked into the victim's room, without entering the room, and it appeared to her that the victim was in his bed. The doors leading from the unit at issue to the outside could not be kept locked because it was an emergency exit. Whilst there was an alarm installed on one door to alert the staff when it was opened, the sliding glass doors through which the victim apparently left had no such alarm.

At trial, both the intermediate appellate and state supreme courts found the evidence insufficient to support a conviction for homicide by reckless conduct of Serebin. The major obstacle to the conviction was a causal link between the failure of Serebin to provide more staff and the victim's death. State regulations required staff to make the rounds every two hours, but this was not possible with the reduced number of staff. Under the situations, the state argued that had more than two aides or one nurse been available for the supervision of residents on the unit at issue, the victim could not have wandered away undiscovered, and one could have monitored the halls and doors while the others made more careful checks of the rooms. However, what the state proved from the evidence was that such a closer bed check might have revealed the victim's absence sooner than it actually was discovered. The causal issue considered at trial was whether it would have *prevented his death.*

The victim's death occurred between midnight and 3:00 a.m. when the aide had assisted the victim approximately twenty minutes before midnight. There was no evidence concerning how quickly the victim died when exposed to the temperature of between 8°

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[44] Prior to the incident, Serebin was repeatedly warned by his own staff and state officials that the insufficient staffing created a situation in which the patients did not receive adequate care and supervision, that staffing deficiencies jeopardized their health, safety and welfare, and especially that wandering residents could not be watched. The evidence indicated that Serebin knowingly allowed the probability of dangers to exist that (1) elderly patients who require close supervision and care would be unobserved when they left the building and were exposed to the elements during harsh weather; or (2) they might not receive prompt medical attention when ill or injured. These dangers were likely to happen due to the lack of staff and increasing number of the patients. The evidence also indicated that Serebin knew that the victim walked away from the ward on prior occasions by reviewing the 24-hour reports which were complied by unit nurses daily and detailed new admissions, discharges, and changes in conditions. (1984) 350 N.W. 2d. 65 at pp. 69-70.

and 15°F. These facts showed that even had the ideal two-hour bed check been possible within sufficient staff, the victim might have wandered outside and died of exposure within a two-hour interval between bed checks.

The other factor impeding the Serebin's conviction was the aide's manner of checking. She actually peeked into the victim's room from the doorway. Even if this cursory check of the unit was in fact the routine followed by the others, it was not clear whether this checking manner resulted from the staffing shortage and her inability to perform her duties as thoroughly as she would have had more staff members.

Suppose that in this case the company had not pleaded no contest to the homicide charge and the identification principle was applied. Under the circumstances, the focal point for corporate liability would have been whether the reckless conduct of one of the nursing administrators of the company (Serebin) could be identified with that of the company itself. Serebin's reckless conduct consisted in, based on his motive of operating the nursing home within the budget, his reducing the staff and accepting patients. This caused the situations in which it was impossible for the nurses and aides to make the rounds every two hours, as was required by state regulations.

At trial, the state failed to prove two vital causal links: one between the victim's death and the impossibility of the ideal two-hour bed check due to the staff reduction; and the other between the staff shortage and the cursory check by the aide who was in charge of the victim's unit.[45] The state's failure to prove these causal links was due to the fact that Serebin's conduct of reducing staff was over-emphasised. Although such conduct contributed to a major extent to the victim's death, account should also have been taken of the other factors that could have avoided the victim's death; such as the failures to install the alarm on the doors of the building and to train the staff irrespective of the staff reduction.[46]

Since focusing exclusively upon the conduct of the controlling officer associated with the same person's relevant mental states, the identification principle cannot cover the full range of factors all of which, as a whole, could have prevented the victim's death. The following two cases illustrate another flaw of this principle in relation to the

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[45] The issue of how to connect individuals' negligence to corporate fault in the context of corporate manslaughter will be dealt with in Chapters 5 and 6.

[46] These factors might have resulted from the Serebin's motive directed at the tight budget, but not from his intent or recklessness associated with his conduct of reducing the staff which the state proved.

issue of foreseeability on the part of the controlling officer.

Case 9 (Commonwealth v. Welansky[47])

On 28 November, 1942, and for about nine years before that day, a corporation maintained and operated a night club in Boston, for the furnishing to the public for compensation of food, drink and entertainment, consisting of orchestra and band music, singing and dancing. It employed about eighty persons. The corporation, its officers and employees, and its business were completely dominated by the defendant, who owned and held in his own name or the names of others, all the capital stock of the corporation. He was entitled to and took all the profits. Internally, the corporation was operated with regard to individual form. Responsibility for the number of condition of safety exits had not been delegated by the defendant to any other employees.

Twelve days before that day, he became suddenly ill and was carried to a hospital, where he was in bed for three weeks and remained until discharged on 11 December, 1942. During his absence, the practice of the night club was usual and regular, apart from the lighting of a match described below.

A little after ten o'clock on the evening of Saturday, 28 November, 1942, the night club[48] was well filled with a crowd of patrons.[49] There were 250-400 persons in the Melody Lounge, 400-500 persons in the main dining room and the Caricature Bar, and 250 persons in the new Cocktail Lounge. Exclusive of the new Cocktail Lounge, the reasonable capacity of the night club was 650 persons. Thus, many persons were standing in various rooms.

A bartender in the Melody Lounge noticed that an electric bulb which was in or near the coconut hunks of an artificial palm tree in the corner had been turned off and that corner was dark. He directed a sixteen-year boy, who was waiting on customers at the tables, to cause the bulb to be lighted. The bar boy got a stool, lighted a match in order to see the bulb, turned the bulb in its socket, and thus lighted it. Then, he blew the match out, and started to walk away. Allegedly, the flame of the match had ignited the palm tree and that had speedily ignited the low cloth ceiling near it, for both flamed up almost instantly. The fire spread with great rapidity across the upper part of the room, causing much heat. The crowd in the Melody Lounge rushed up the stairs, but the fire preceded them. People caught fire while on the stairway which led to the ground floor. The fire then spread speedily across the ground floor, where the foyer, the Caricature Bar, the main dining room, and the Cocktail Lounge located. Soon after the fire started, the lights in the night club went out. The crowd were panic stricken, and rushed and pushed in every

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47 (1944) 55 N.E. 2d. 902. See also C.M.V. Clarkson & H.M. Keating, *Criminal Law - Text and Materials* (1998, 4th ed., Sweet & Maxwell, London), pp. 437-440.

48 The night club at issue consisted of several rooms: the Melody Lounge (1895 square feet, containing a bar, tables and chairs, at the basement of the night club); the main dining room (3765 square feet, including a dance floor and about 70 tables each of which was for 2-8 persons, at the ground floor); the Caricature Bar (1399 square feet, containing two bars, stools and chairs, at the ground floor); and the new Cocktail Lounge (781 square feet, at the ground floor). (1944) 55 N.E. 2d. 902 at pp. 905-906.

49 It was during the business season of the year, and an important American football game in the afternoon had attracted many visitors in Boston. *Ibid.* at 906.

direction through the night club, screaming and overturning tables and chairs in their attempts to escape.

There were only some doors at the Cocktail Lounge and a single revolving door of the whole building of the night club as entrances and exits intended for the ordinary use of patrons, and the exit through the wooded partition from the Melody Lounge for employees. At the time of fire, the revolving door soon jammed, but it was burst out by the pressure of the crowd. A considerable number of patrons escaped through the doors at the Cocktail Lounge, but many died just inside the doors. In addition to these doors, there were five possible emergency exits from the night club, all on the ground floor. Nonetheless, each door of these five exits could not easily be opened at the time of fire due to the owner's poor arrangements of them. Neither were most of the patrons informed of the existence of these doors.[50] After all, some employees and a great number of patrons died in the fire. Others were taken out of the building with fatal burns and injuries from smoke, and died within a few days.

The owner of the night club and his brothers were indicted for manslaughter in sixteen counts. The alleged misconduct of the defendants consisted in causing or permitting or failing reasonably to prevent defective wiring, the installation of inflammable decorations, the absence of fire doors, the absence of proper means of egress properly maintained and sufficient proper exits, and overcrowding. The defendants' wanton or reckless conduct allegedly consisted in the breach of a legal duty to their invited members of the general public (= patrons) to use reasonable care to keep its premises safe for their use; in reckless disregard of such duty and of the probable harmful consequences to the victims.

This is a case in which the owner of a night club was held responsible for his failures both to prevent the fire from causing the death of victims and to use reasonable steps to keep his premises safe. As for the relationship between his personal liability and corporate liability, the court held that:

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[50] The details of each door were: (1) a door at the head of the stairway leading to and from the basement Melody Lounge; (2) a door leading from the foyer, near the revolving door; (3) two doors from the middle of the wall of the main dining room; (4) the service door at the foot of a stairway leading to dressing rooms on the second floor; and (5) the door leading from a corridor separated from the Melody Lounge at the basement.

The door (1), apparently not visible from the greater part of the foyer, was locked by a separate lock operated by a key that was kept in a desk in the office. At the time of fire, this door was not open until firemen broke it down from outside with axe. Two dead bodies were found close to it, and pile of bodies about 7 feet from it. The door (2) could not be opened fully, because of a wall shelf. In addition, this door was commonly barred in the evening, as well as at the time of fire, by a removable board with clothing hooks on it. The doors (3) could be opened after some difficulty. One of these doors did not open upon pressure, and it had to be hammered with a table before it would open. The other had to be opened after dining tables near the door were moved away. The door (4) was known to employees, but doubtless not to patrons, because it led to the dressing room to which patrons were not admitted. The door was kept locked by the direction of the defendant, and the key was kept in a desk in the office. The door (5) was also unlikely to be known to patrons because this door was led from a corridor at the basement into which patrons had no occasion to go. This door, too, was kept locked by the direction of the defendant. The doors (4) and (5) were locked at the time of fire, and were opened by force from outside by firemen and others. Some patrons escaped through the door (4) and (5), but many dead bodies were piled up inside them. *Ibid.*

> "There is nothing in the point that because the corporation might have been indicted and convicted, the defendant could not be. The defendant was in full control of the corporation, its officers and employees, its business and its premises. He could not escape criminal responsibility by using a corporate form."[51]

Suppose, again, that the company was indicted for the homicide caused by its owner's failures and the identification principle was applied in this case. There is no doubt that in this case the owner's fault would be identified with that of the company. One point would be unclear, however.

The defendant's fault, of course, resulted from the breach of "a legal duty [imposed on the owner to the] invitees to use reasonable care to keep [his] premises safe for their use."[52] And the Commonwealth specified the nature of the casualties of the victims and "the harmful consequences to which acts or omissions of the defendant exposed to the several victims and which could have been foreseen by the defendant."[53] It is thus reasonable to assume that the defendant, as the owner of the company, failed to organise a safe and secure system regarding fire doors and this failure was legally linked with the victims' death. But what about his foresight or foreseeability of the immediate cause of fire? His breach of a legal duty included permitting the installation of inflammable decorations (as in this case, an artificial palm tree) through which the fire occurred and spread. The fire was actually caused by a sixteen-year boy, who was unlawfully employed by the defendant. It is definite that this boy's careless conduct caused the fire which spread over the building, with the help of the defendant's failures to take reasonable steps to keep his premises safe. It is doubtful, however, whether the boy's conduct could have been foreseen by the defendant.

The reasoning developed by the court for the defendant's fault has no relation to the boy's misconduct of causing the fire. On the contrary, it was held that:

> "To convict the defendant of manslaughter, the Commonwealth was not required to prove that he caused the fire by some wanton or reckless conduct. Fire in a place of public resort is an ever present danger. It was enough to prove that death resulted from his wanton or

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51 *Ibid.* at 912.

52 *Ibid.* at 908.

53 *Ibid.*

reckless disregard of the safety of patrons in the event of fire from any cause."[54]

It is suggested that this reasoning is deficient in that it fails to capture the defendant's fault relevant to the source of risk. Whilst it may be true that "fire in a place of public resort is an ever present danger," a clear line should be drawn in the context of criminal liability between the failures to prevent the fire from occurring and the failures to prevent the occurrence of fire from causing the consequences.[55]

As the court concluded in this case, the defendant's failures to prevent the unlawful employment of minors "plainly had little or no relation to any wanton or reckless conduct that might result in manslaughter."[56] That is, there was no fault on the part of the defendant as to the immediate cause of the fire at issue. Nevertheless, the defendant was blamed only for his failure to prevent the unforeseeable occurrence of the fire from causing the consequences. This is another limitation inherent in the identification principle in that one controlling officer's fault cannot cover the full range of corporate fault.

The other example concerning the issue of foreseeability on the part of controlling officers is described below.

Case 10 (People v. Warner-Lambert Co.[57])

The defendant company was a manufacturing corporation that produced Freshen-Up

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54 *Ibid.* at 912.

55 Suppose that in this case, the fire at issue was caused by one of the patrons' misconduct, or that a terrorist group attacked the night club and unintentionally caused the fire. In these examples, it would not be reasonable to assume that the owner of the night club could have foreseen the cause of fire and, hence, could have been expected to taken any preventive steps against it.

56 (1944) 55 N.E. 2d. 902 at 908. This is because the purpose of relevant statutes which proscribe the unlawful employment of minors is not directed towards the liability of an employer for the result of these minors' possible misconduct. See, for example, H.L.A. Hart & T. Honoré, *Causation in the Law* (1985, 2nd ed., Clarendon Press, Oxford), ch.4.

57 (1980) 414 N.E. 2d. 660. See also Grogin, *supra* note 23 at pp. 1421-1422; Ebers, *supra* note 23 at 982; Koprowicz, *supra* note 23 at pp. 213-216; Hochstedler, *supra* note 23 at pp. 166-167; Radin, *supra* note 23 at pp. 41-45; Weinfeld, *supra* note 23 at 655-659.

chewing gum, which is retailed in the shape of a square tablet with a jellylike centre.[58] In February 1976, the insurance carrier for the corporation inspected its plant and advised that the dust condition in the Freshen-Up chewing gum production area presented an explosion hazard and the MS concentration was above the LEL, together with recommendations for installation of a dust exhaust system and modification of electrical equipment to meet standards for dust areas. A variety of proposals for altering the dust condition were considered by the defendant individuals (the vice president in charge of manufacturing, director of corporate safety and security, plant manager and plant engineer) in consultations and communications with each other. Some alternations in the MS application were made, and an executive decision was made to work towards the eventual elimination of MS entirely by modification of the Freshen-Up equipment. However, this modification had not been accomplished fully; only one of six Uniplast machines had been modified, and approximately 500 pounds of MS a day were still used in Freshen-Up production at the time of the incident. Employees were wearing face masks and goggles to protect their eyes and breathing passages, and just prior to the tragedy, when sweeping and airhosing of accumulated MS was in progress, there were rising dust and a "heavy fog" or "mist" all around.

On 21 November, 1976, the corporation was operating six Uniplast machines in the production of Freshen-up chewing gum on the fourth floor of its Long Island City plant, New York. The machines were almost in constant operation (24 hours per day, six days a week, producing two million packages of gum a day). However, at the time of the catastrophic explosion near the end of one of the work shifts, only one machine (designated the "D" machine) was in operation and employees were cleaning settled MS dust off of the base of that machine and the overhead pipes by broom sweeping and by the use of air hoses. Suddenly an explosion occurred in the area of the operating machine, followed almost immediately by a second, much larger explosion accompanied by flames which caused injuries to more than 50 workers in the area (six of whom died) and extensive damage to the building and equipment, which was attributed to burning of ambient dust and explosion rather than general fire. Apparently, a spark caused an explosion around the "D" machine. A primary explosion had occurred at the "D" machine which dispersed added MS dust into the atmosphere and could have caused the second, greater explosion. The ceiling of the floor below the "D" machine had been covered with

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[58] The manufacturing process of this gum involved passing filled ropes of the gum through a bed of Magnesium Stearate (MS), a dry, dust-like lubricant which was applied by hand, then into a die-cut punch (a Uniplast machine) splayed with a cooling agent (liquid nitrogen), where the gum was formed into the square tablets. Both MS and the liquid nitrogen were utilised to prevent the chicle from adhering to the sizing and cutting machinery, the tendency to adhere being less if a dry lubricant was employed and the punch was kept at a low temperature. This process dispersed dust into the air, which accumulated both at the bases of the Uniplast machines and on the plant's overhead pipes. Some also remained ambient in the atmosphere in the surrounding area. (1980) 414 N.E. 2d. 660 at pp. 661-662.

Both the MS (normally an inert, organic compound that in bulk, powdered form) and the liquid nitrogen were considered safe and were widely used in the industry. In bulk, MS will only burn or smoulder if ignited; however, if suspended in the air in sufficient concentration the dust poses a substantial risk of explosion if ignited. The minimum concentration at which an explosion can occur is denominated the Lower Explosion Level (LEL). On the other hand, liquid nitrogen, with a boiling temperature of minus 422 degrees Fahrenheit, is an effective cryogenic which might play a part in the process of "liquefaction," the production of liquid oxygen in the course of the condensation of air on its exposure to a source of intense cold. Liquid nitrogen is highly volatile, is easily ignited and, if ignited, will explode. Among possible causes of such ignition of either liquid oxygen or ambient MS are electrical or mechanical sparks. *Ibid.* at 662.

peeling paint, indicating that the temperature of that machine was colder than the others, and the machine's base, made of cast iron, had cracked, perhaps by the reason of the cold.

The corporation and several of its officers and employees were charged with six counts of manslaughter in the second degree and criminally negligent homicide. There was no direct proof as to what triggered the initial and second explosions. The prosecution's theory of causation was that the initial detonation was attributable to mechanical sparkling resulting from the breakup of the metal parts of the "D" Uniplast machine, possibly occasioned by the machine's having become overheated or overloaded, by vibration, or by slipping of components. Another explanation for the initial explosion by the prosecution was that liquid oxygen, produced through liquefaction as air condensed on the highly volatile liquid nitrogen - cooled parts of the "D" machine - dripped onto settled MS dust at the base of the Uniplast, became trapped there and then, when subject to the impact caused by a moving metal part, reacted violently, causing ignition of already dispersed MS.

The New York Court of Appeals, however, dismissed the indictments of manslaughter against the defendants. Whilst the defendants were aware of a broad, undifferentiated risk of an explosion from substances used in the company's manufacturing operations, the evidence submitted by the prosecution was not legally sufficient to establish the foreseeability of the actual, immediate, triggering cause of the explosion. It is for this reason that the defendants could not be held criminally liable on a theory of either reckless or negligent conduct.

As far as the foreseeability issue is concerned, this case imposed an additional requirement in that it focused on the precise chain of physical events leading to the prohibited result or the particular cause of death.[59] This means that it would not be sufficient to prove that the explosion itself was foreseeable to the defendants. This requirement is, however, extremely difficult to satisfy in practice when applied to the identification principle.

In this case, several officers of the manufacturing company were remote from specific manufacturing operations. On the other hand, the lower-level workers might have the technical expertise or detailed knowledge of the manufacturing process at issue, but might not have sufficient authority and responsibility to prevent the hazardous conditions. This dilemma cannot be avoided, as the identification principle is concerned with conduct and mental states of the particular officer(s) sufficiently high in the corporate hierarchy. Fault on the part of the officers (the vice president, director in charge of manufacturing safety and security, plant manager and plant engineer in this case) should be identified in that they failed to ensure that their proposals for altering the hazardous dust conditions had not fully been accomplished. The foreseeability of

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[59] Weinfeld, *supra* note 23 at 658.

the particular chain of events would be irrelevant to their fault, since the explosions can be said to be the consequences of their failure to execute their proposals.

The following case demonstrates another deficiency of the identification principle that focuses exclusively on the particular controlling officers for imposing liability on corporations.

Case 11 (People v. O'Neil[60])

> Film Recovery was engaged in the business of extracting, for a resale, silver from old w-ray and photographic film. Its sister company, Metallic Marketing, owned 50% of the stock of Film Recovery. The recovery process, called cyanide-leaching, was performed at Film Recovery's plant.[61] Working with the sodium cyanide solution imposed the risk of inhaling poisonous gas. Cyanide-contaminated water from open vats, which splashed on the plant's floor, posed an additional risk. Film Recovery used Cyanogran brand sodium cyanide to reclaim silver. Every container of Cyanogran carried a warning label that, in English, read: "Poison. Danger! May be fatal if inhaled, swallowed or absorbed through skin. Contact with acid or weak alkalies liberates a poisonous gas.... Do not breathe dust or gas. Do not get in eyes, on skin, or clothing."[62]
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> To prevent the danger, similar companies installed hooded vents over each vat which removed the poisonous gas from the plant. Film Recovery, however, used a ceiling exhaust system which did not remove any contaminated air, but merely moved that air around the plant. In addition, Film Recovery mainly employed illegal immigrants from Mexico or Poland who spoke little or no English. The employees also wore improper respirators; namely, faced masks designed to prevent them from inhaling *particulate*. Indeed, plant workers were not told by the president, plant manager nor two foremen of Film Recovery that they were working with cyanide or that compound put into the vats could be harmful when inhaled. Nor were they given any safety instructions, goggles to protect their eyes, or adequate protective clothing. Their clothing would become wet with the solution used in the vats. There were small puddles of the solution as well as the film

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60 (1990) 550 N.E. 2d. 1090. The facts of this case are also derived from *Wall Street Journal*, 15 and 17, June 1985; D.R. Spiegel, "The Liability of Corporate Officers" (1985) *ABA Journal* 48. See also Grogin, *supra* note 23 at pp. 1425-1433; Ebers, *supra* note 23 at pp. 982-983;; Magnuson & Leviton, *supra* note 23 at pp. 913-915; Koprowicz, *supra* note 23 at pp. 218-219; Brickey, *supra* note 23 at pp. 755-763; Miester, *supra* note 23 at pp. 929-930; Hochstedler, *supra* note 23 at pp. 169-170.

61 The recovery process involved "chipping" the film product and soaking the granulated pierces in large open bubbling vats containing a solution of water and sodium cyanide. The cyanide solution caused silver contained in the film to be released. A continuous flow system pumped the silver laden solution into polyurethane tanks which contained electrically charged stainless steel plants to which the separated silver adhered. The plates were removed from the tanks to another room where the accumulated silver was scraped off. The remaining solution was pumped out of the tanks and the granulated film, devoid of silver, shovelled out. Finally, the silver flakes are shipped to refinery where they are made into silver bullion. (1990) 550 N.E. 2d. 1090 at 1092.

62 *Wall Street Journal*, 15 June 1985, pp. 1 and 29; Grogin, *supra* note 23 at 1426.

chips on the plant floor around the vats. As a result of the solution exposing skin and a strong and foul odour permeating the plant, they experienced breathing with difficulty and pain, dizziness, nausea, headaches and bouts of vomiting.[63]

In December 1982, a 61-year-old non-English speaking illegal Polish immigrant began working at Film recovery, pumping and stirring the sodium cyanide solution inside the vats with a rake. Shortly thereafter, he began to come home from work with headaches, nausea and vomiting. On 4 February, 1983, after becoming sick on the job, he brought an interpreter to the plant to ask the plant manager to transfer him away from the sodium cyanide vats. The plant manager said that he would try to help, but on the next working day, the polish worker was again assigned to the vats.[64]

Six days later, he had difficulty in walking at the vats. When his fellow workers noticed his pale face and foam forming at his mouth, they carried him outdoors to the parking lot, and called paramedics to the scene. When they arrived, the Polish worker was not breathing and had no pulse. He died of acute cyanide poisoning through the inhalation of cyanide fumes in the plant air.[65]

As a result, a grand jury indicted the president of Film Recovery, plant manager, and two plant foremen for murder, by failing to disclose and to make known to the victim that he was working with cyanide and substances containing cyanide, and by failing to instruct him as to matters involving safety procedures and proper handling of chemicals at issue.[66] The murder indictment also stated that these individuals failed to provide the victim with appropriate and necessary safety and first-aid equipment and sundry health-monitoring systems for his protection while working with and handling cyanide, and with the storage, detoxification and disposition of cyanide. Additionally, they were indicted for 20 counts of reckless conduct. On the other hand, Film Recovery and Metallic Marketing, a sister company, were indicted for one count of voluntary manslaughter, unintentionally killing of the victim, by authorizing, requesting, commanding and performing certain acts of commission and acts of omission by their officers, board of directors and high managerial agents.[67]

Under the identification principle, the same evidence is used both against the individual (= controlling officers) and corporate defendants. Therefore, it is impossible to charge each defendant with the different type of crime based on the identical evidence. Unless the appropriate penalties for murder are available for the verdict against the corporation,

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63 (1990) 550 N.E. 2d. 1090 at 1098. On August 1982, a representative of the company that supplied Film Recovery with first aid kits visited the plant. She observed an overpowering ammonia-like odour that burned her eyes, throat and nose. She experienced breathing difficulty and nausea. She also noticed that the sodium cyanide vats were overflowing and the floor was covered with crystal-like chips. The first aid kits were also covered with similar crystal chips. (1990) 550 N.E. 2d. 1090 at pp. 1099-1100; Grogin, *ibid.* at 1426-27.

64 *Wall Street Journal*, 15 June 1985, p. 29; Grogin, *ibid.* at 1427.

65 (1990) 550 N.E. 2d. 1090 at 1092.

66 *Ibid.* at 1096-1097.

67 *Ibid.* at 1096.

the mental states of individual offenders necessary for murder cannot be utilised for corporate liability for manslaughter. In this light, it is not surprising that on appeal the intermediate appellate court ruled that the verdicts were inconsistent and remanded the case for retrial.[68]

In theory, some commentators have advocated that it is possible to hold corporations liable for murder under the identification principle.[69] As far as English Law is concerned, however, this advocacy is purely "academic,"[70] since murder is punishable only with the infliction of imprisonment for life.[71] This leads to a conclusion that under the identification principle, a company cannot be held liable for murder even if its controlling officers perform an act of murder within the scope of their office on behalf of the company. This limitation results from the derivative nature of corporate liability in that the identification principle requires the charge and verdict against the controlling officers to be the same as those against the company.

The following famous English case provides a vivid example of the derivative

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68 *Ibid.* at 1098.

69 See, for example, Winn, *supra* note 13 at 415, insisting that:

> "Intellectual difficulty is still felt in giving corporate significance to certain kinds of acts, and a tendency is still perceptible to regard certain actions as in the nature of things incompatible with the intangible non-physical nature of corporations. Perhaps most incongruous of all seem to be the two crimes of murder and rape ..... Yet it may well be urged that such a company as was the East India Company, having wide powers of government in a distinct land and employing soldiers to maintain discipline, might be rendered guilty of either crime by the orders of its directing body that a day of terror be inflicted on a recalcitrant city."

See also G.O.W. Mueller, "Mens Rea and the Corporation: A Study of the Model Penal Code Position on Corporate Criminal Liability" (1957) 19 *University of Pittsburgh Law Review* 21 at 23, stating:

> "Why should not a corporation be guilty of murder where, for instance, a corporate resolution sends the corporation's workmen to a dangerous place of work without protection, all officers secreting from these workmen the fact that even a brief exposure to the particular work hazards will be fatal ...?"

Obviously, Mueller anticipated the situations in which it would be possible to say that the company can murder people through its "inner circle" (consisted of primary agents, the board of directors or high managerial agents of the company), as are found in the Chicago Magnet Wire case (*Case 5*) and the O'Neil case (*Case 11*). See further W.H. Hitchler, "The Criminal Responsibility of Corporations" (1923) 27 *Dickinson Law Review* 89, 121 at pp. 135-136.

70 R.S. Welsh, "The Criminal Liability of Corporations" (1946) 62 *Law Quarterly Review* 345 at 364.

71 P.J. Richardson (ed.), *Archbold - Criminal Pleading, Evidence and Practice* (1999, Sweet & Maxwell, London), §19-92.

nature of corporate liability under the identification principle.

Case 12 (R. v. P & O European Ferries (Dover) Ltd.[72])

On the night of 6 March, 1987, the *Herald of Free Enterprise*, an English "roll-on, roll-off" ferry, capsized minutes after slipping its moorings at the Belgian port and heading out for the Channel, with the result that 192 people were drowned. The immediate cause of the capsizing was that the ferry put to sea with its bow doors open.

The official inquiry into the disaster discovered the fatal chain of errors that led to the sinking: the errors made by the assistant boatswain who did not perform his duty to close the doors;[73] the bosun who failed to supervise the assistant boatswain; the first officer in charge of the leading docks who did not ensure that the doors had been closed;[74] the captain of the ferry whose overall responsibility was to check with anyone that, for safety, the doors had been closed; the senior master who was responsible for establishing a safety system for the ferry; and the directors of Townsend Car Ferries that was taken over by the P & O European Ferries a month before the tragedy, who had been told of previous open-door incidents but had not taken any measures against them.[75] Some of P & O's ships masters had actually recommended the introduction of warning lights on the bridge in order to show the captain whether or not doors had been closed, but such an appeal had not drawn the attention of management.[76]

At the inquest the jury ignored the coroner's instruction that evidence did not support a verdict of corporate manslaughter, and found, based on the report of the inquiry,[77] that the victims of the Zeebrugge disaster had been unlawfully killed. After a new enquiry initiated by the Kent police, a summons alleging corporate manslaughter

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72 [1991] 93 Crim. App. R. 72; R. v. HM Coroner for East Kent [1989] 88 Crim. App. R. 10. The facts are also derived from *The Times*, 3, 8, 25, 28 April, 25 July, 20 October 1987; *The Independent*, 21 October 1990; *The Washington Post*, 7 March 1987; *The New York Times*, 8 March 1987; Department of Transport, *mv Herald of Free Enterprise* (Report of Court No. 8074), Formal Investigation (1987, HMSO, London) [hereinafter cited as *Sheen Report*]; S. Crainer, *Zeebrugge: Learning from Disaster - Lessons in Corporate Responsibility* (1993, Herald Charitable Trust, London).

73 "He had fallen asleep in his cabin after having worked for ten hours non-stop and failed to hear the call "harbour stations". *The Times*, 20 October 1990.

74 The first officer assumed that the assistant boatswain was shutting the doors and the bosun also assumed that his first officer had checked on the doors. *The Times*, *ibid.*

75 It emerged that on fewer than five occasions its ferries has started for sea with bow or stern doors open. *The Times*, *ibid.*

76 This was a critical fact in favour of the case of the defendants that they were not aware of the risk. See Gobert, *supra* note 34 at 406; *infra* note 80.

77 See *Sheen Report*, *supra* note 72 at para. 14.1, concluding that:

> "All concerned in management, from the members of the Board of Directors down to the junior superintendents, were guilty of fault in that all must be regarded as sharing responsibility for the failure of management. From top to bottom the body corporate was infected with the disease of sloppiness."

See also R. v. HM Coroner for East Kent [1989] 88 Crim. App. 10 at 12.

against P & O European Ferries as well as against seven individuals (two representatives of senior management, the senior master, the captain, and three other staff members) was issued on 22 June, 1989.

At a preliminary hearing, corporate liability for manslaughter was well established in English law by Turner J., the trial judge:

> "if it be accepted that manslaughter in English law is the unlawful killing of one human being by another human being (which must include both direct and indirect acts) and that a person who is the embodiment of a corporation and acting for the purposes of the corporation is doing the act or omission which caused the death, the corporation as well as the person may also be found guilty of manslaughter."[78]

It was generally demonstrated here that the identification principle which was established in the Tesco case[79] would be applied in the case of corporate manslaughter if the reckless mental states of a person of the "embodiment"of the company were proved. In this case, the defendant company could be convicted of manslaughter if it was proved that conduct of the board of directors of P & O had been reckless, and that it was the cause of the deaths.

Turner J., however, indicated that there was no direct evidence that the controlling officers of the defendant company would or should have perceived that there was an obvious risk from the open bow doors. Since the Crown failed to prove that the directors, senior managers or ship masters ought to have known that there was an obvious and serious risk of the ship sailing with its bow doors open, Turner J. directed acquittals against P & O and five senior employees.[80] Those who perceived such risk were the

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78 R. v. P & O European Ferries (Dover) Ltd. [1991] 93 Crim. App. R. 73 at pp. 88-89.

79 Tesco Supermarkets, Ltd. v. Nattrass [1972] A.C. 153.

80 R. v. Alcindor and Others (unreported, Central Criminal Court, 19 October 1990), referred to in D. Bergman, "Recklessness in the Boardroom" (1990) 140 *New Law Journal* 1496. See also Wells, *Corporations*, *supra* note 14 at pp. 68-72; Law Commission, Consultation Paper No.135, *Involuntary Manslaughter* (1994, HMSO, London), paras. 4.38-4.44. Bergman (*ibid.* at 1496) enumerates four reasons why the Crown could not prove recklessness on the part of P & O:

(1) "the system in operation had worked without mishap over seven years in which there had been upwards of over 60.000 sailings of Spirit class ships, about 5.000 of the sailings being on the Zeebrugge run." ("The mere pronouncement by the Crown that this was a disaster waiting to happen and that the system had somehow managed to operate due to good fortune was not sufficient to overturn the inference from the above statistics.")

(2) "a large number of competent and skilled former and present P & O Masters and Chief Officers.... testified that it had not occurred to them that any risk existed, let alone that it was an obvious one of the ship sailing with its bow doors open." ("The Crown's response to this was that they were bound to say this since their minds were innured to the defects of a system which they were operating daily, and it was for the jury to consider whether they thought the system safe.... But as Mr Justice Turner said this can be no substitute for evidence of what the hypothetically prudent master or mariner.... would have perceived as obvious and serious.")

(3) "four of the five open door incidents - where a ferry, prior to the disaster left port with its doors open and which, despite no injury occurring, the Crown contested ought to have altered the shore based manners to the defects in the system - were not known by any of the defendants.... As Mr Justice Turner said, concerns about these incidents were never exported from that particular vessel on which they occurred."

(4) "neither regulations from the Department of Transport nor Lloyds insurers required the

assistant boatswain who had not closed the bow doors, and the officer of the leading docks who had not checked that the bow doors were closed. On October 1990, the prosecution dropped all charges against these two on the grounds that they would be "made scapegoats for errors committed by the whole community",[81] and that it was not in the public interest to proceed against them alone.[82]

This case involves several similar factors comprising corporate fault that were already referred to in the Kite case (*Case 4*). That is to say, the main three failures by the company are legally connected to the victim's death: a failure to prevent the source of risk from occurring or causing the prohibited consequences; a failure to train the employees who were in the closest position to the source of risk; and a failure to organise a safe and secure system in order to prevent their mistakes from triggering the disastrous incident. In this case, the source of risk was inherent in the sailing of the ferry with the bow doors open. The nearest employee to the source of risk was the assistant boatswain who did not close the doors. His failure to close the doors was aggravated by his several superior employees' failures to ensure that the doors had been closed, namely, the bosun,[83] the first officer of the dock, and the captain. These failures could not have caused the capsize of the ferry if someone else at the deck noticed that the doors were open. However, no one did mainly because the directors of P & O took no account of the recommendation by several P & O ships masters that warning lights should be installed on the bridge.

Although having extended the identification principle to corporate liability for manslaughter, Turner J. also imposed severe limits on this principle. In his view, for the company to be held liable for the offence committed by one of its controlling officers, it must be proved that s/he is personally guilty of his/her offence.[84] In this case, no

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installation of Bridge Lights to indicate that the bow doors were closed, or a system of positive reporting."

81 *The Times*, 25 July 1987.

82 D. Burles, "The Criminal Liability of Corporations" (1991) *New Law Journal* 609.

83 He was even not aware of his duty to make sure that the assistant boatswain closed the doors or that anybody was at the deck in question to close the doors. *Sheen Report*, *supra* note 72 at para. 10.2.

84 This limit was followed by the Kite case (*Case 4*). See A. Ridley & L Dunford, *Killing*, *supra* note 25 at 107, citing R. v. Kite, Stoddart and OLL Ltd. (unreported, transcript p. 18C-G.)

controlling officer was proved to have the requisite mental states for manslaughter, so that the acquittals of P & O and five senior officers were inevitable.

This derivative nature of corporate liability under the identification principle, developed by Turner. J. in this case, is premised upon the fact that the company can only act through the controlling mind of its agents.[85] Although this fact is undeniable, his argument is a *non sequitur*. The company can perform a *criminal* act of manslaughter through the acts of its members, but this does not necessarily mean that the members, including controlling officers, must be culpable enough to be held personally liable for their acts which constitute corporate manslaughter.

In this case, again, three types of fault are clearly identified on the part of the company: the failure to prevent the source of risk from occurring; the failure by the middle management to train employees in the closest position to the source of risk; and the failure to organise a safe system. Each of them was interrelated and if one or some of them which could be avoided did not occur, then the capsize of the ferry could have been avoided. Conversely, when these three types of fault concurred, the consequences would not have been avoided. The controlling officers (in this case, the directors of P & O) were involved in the last type of failure, which alone was not sufficiently culpable to constitute corporate fault.[86] All these things make it clear that even controlling officers cannot make a full contribution to the corporate fault. This holds true of such cases as the Kite case (*Case 4*), in which the fault of one of the controlling officers was clearly identified with that of the company. To prove fault of a controlling officer is to show that s/he was at fault, but not to show that the company was at fault as a company.[87] If it is proved that there were some factors other than the controlling officer's fault that contributed to the prohibited consequences, then account should be taken, irrespective of whether or not the controlling officer was involved in them, of the *collective* aspect of corporate fault.

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85 (1991) 93 Crim. App. R. 72 at 84.

86 See *supra* note 55.

87 B. Fisse, *Howard's Criminal Law* (1990, 5th ed., Law Book Company Ltd., Sydney), p. 603.

Turner J. also agreed with Bingham L.J.'s rejection of the aggregation theory in R. v. HM Coroners for East Kent.[88] Bingham L.J.'s reasoning against aggregating the acts and mental states of several employees of P & O derived from his application of the identification principle to corporate manslaughter, holding that:

> "A company may be vicariously liable for the negligent acts and omissions of its servants and agents, but for a company to be criminally liable for manslaughter .... it is required that the *mens rea* and *actus reus* of manslaughter should be established not against those who acted for or in the name of the company but against those who were to be identified as the embodiment of the company itself.... I do not think the aggregation argument assists the applicants. Whether the defendant is a corporation or a personal defendant, the ingredients of manslaughter must be established by proving the necessary *mens rea* and *actus reus* of manslaughter against it or him by evidence properly to be relied on against it or him. A case against a personal defendant cannot be fortified by evidence against another defendant. The case against a corporation can only be made by evidence properly addressed to showing guilt on the part of the corporation as such."[89]

It has been suggested that P & O could be held liable for manslaughter if the aggregation theory was accepted.[90] On the other hand, the other solution to what Wells calls "the P & O problem"[91] may be found in the following American case.

Case 13 (US v. Van Schaik[92])

> A steamboat company was inspected by the US inspectors on 5 May, 1904, and was permitted to navigate for a year the waters of the Bay and Harbour of New York, rivers tributary Long Island Sound, and coastwise between Rockaway Inlet and Long Branch. On 15 June, 1904, while the boat was navigating the East River, a fire broke out. The fire was so uncontrolled that many passengers were compelled to jump from the burning ship into the water, and some 900 were drowned.
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> The deaths of passengers were allegedly caused (1) by unsafe, unserviceable, unsuitable, inefficient and useless life preservers, incomplete and unfit equipment of steam

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88 [1989] 88 Crim. App. R. 10.

89 *Ibid.* at pp. 16-17.

90 See, for example, C. Wells, "Manslaughter and Corporate crime" (1989) 139 *New Law Journal* 931 at pp. 931-932; "The Decline and Rise of English Murder: Corporate Crime and Individual Responsibility" [1988] *Criminal Law Review* 788 at 799. The aggregation theory will be critically analysed in the next chapter.

91 C. Wells, "Corporate Killing" (1997) *New Law Journal* 1467 at 1468.

92 (1904) 134 F. 592. See also Rodella, *supra* note 23 at pp. 98-99; Wragg, *supra* note 23 at pp. 68-69; Grogin, *supra* note 23 at 1419; Clark, *supra* note 23 at 913; Hickey, *supra* note 23 at pp. 470-471; D.S. Anderson, *supra* note 23 at pp. 398-399; Helverson, *supra* note 23 at pp. 970-971; Stoner, *supra* note 23 at pp. 1277-1278.

> pumps and hand pumps, and the weak and unserviceable hose that was neither provided for nor attached to the steam pumps and hand pumps, and (2) by the wrongful neglect of the captain to discipline and train his crew, none of who knew or attached to his duty and attempted to unlash and to swing out the lifeboats or the life rafts, in consequence of which the passengers were obliged to throw themselves into the water and drowned on account of the useless and unfit life preservers. As an owner of the steamboat at issue, therefore, the company was indicted under the US federal statute which provided that "every owner.... through whose fraud, connivance, misconduct or violation of law the life of any person is destroyed shall be deemed guilty of manslaughter and upon conviction thereof shall be sentenced to confinement at hard labour."[93] In addition, several officers of the company (the captain, managing director, secretary, treasurer and commodore of the fleet) were charged with aiding and abetting their corporation.

In holding the defendant company liable for manslaughter, the court relied on the company's breach of legal duties imposed by the relevant statute. The court, at first, identified the ship's master as one who should have performed duties for the company, and then detailed these duties. According to the court, the duties of the master of the vessel in question existed on several levels. While it was not his duty to equip the vessel with life preservers and equipment of pumps, yet it was his duty, before navigating, to exercise care to know whether the ship had any equipment and whether it was apparently sufficient and in accordance with the law. Added to this, it was his duty, after the introduction of appliances and equipment, to have some care of its maintenance and to discipline or train the crew to know how to use appliances in cases where the occasion for their use arises. If any defect of the vessel's condition would be discoverable in the exercise of superintendence of the vessel ordinarily demandable of a prudent master, then he must be deemed to have discovered it. Thus, it would be his neglect of duty if he did not exercise due care for the supply or restoration of the omitted or defective parts. Another duty would arise on his part to decline to navigate the vessel if he knew or should have known some total omission of requisite equipment which itself was perilous to human life.[94]

There are two points in common between this case and the P & O case (*Case 12*): the factual backgrounds that the ship sailed in an unsafe manner; and the imputation of particular individual's fault to the corporation. Nevertheless, the Van Schaik case is noteworthy in that the particular individual (the ship's master) was considered by the

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93 Rev. St. §5344 (U.S. Comp. St. 1901, p. 3629), cited in (1904) 134 F. 592 at 593.

94 (1904) 134 F. 592 at pp. 600-609.

court to fail to perform legal duties imposed on the corporation, not on him. The master's fault, analysed by the court, ranged from his failure to exercise due care to discover any defect of necessary equipment to his neglect of duty to train the crew. Although the court did not pay attention to how he failed to control the source of risk (namely, the immediate cause of the fire), it implied that his conduct imputed to the company should be found in his decision to navigate or continue to navigate the vessel deliberately, without any care as to the condition of the vessel.[95]

When applied in the P & O case, this reasoning would be useful, as the directors of P & O had decided to let the ferry continue to navigate without due care for the open-doors situations. Even if the fault element of manslaughter was not fulfilled by these directors, the company could be said to fail, through any members of it, to perform a legal duty not to disregard the risk to human life. This leads to a conclusion that it is necessary to consider not only the controlling officer's state of mind and conduct, but also those of any relevant employees in the corporate setting in order to determine whether the company performed its duties.

3.4. The Doctrine of Vicarious Liability and Corporate Manslaughter

The previous section concluded that full attention should be paid to any relevant conduct and mental states of any corporate members in determining corporate fault. The final question follows from this conclusion: is the vicarious liability doctrine appropriate to assess corporate fault? It is, therefore, desirable to survey several corporate manslaughter cases in which this doctrine has been applied.

Case 14 (US v. Dye Construction Company[96])

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95 *Ibid.* at 600.

96 (1975) 510 F. 2d. 78. See also Koprowicz, *supra* note 23 at pp. 197-199. For the other American corporate homicide cases in which the doctrine of vicarious liability was applied, see, for example, People v. Rochester Railway & Light Co. (1909) 88 N.E. 22 (in which a utility company was indicted for manslaughter in the second degree resulting from the installation of a water-heating equipment in such a grossly improper, unskilful and negligent manner that gas fumes escaped and caused death of an apartment tenant by asphyxiation); Commonwealth v. Illinois Central Railroad Co. (1913) 153 S.W. 459 (in which a railroad company was indicted for involuntary manslaughter when the company's employees unlawfully and with gross and wilful negligence ran railroad cars at unreasonable speed so that they collided into the back of another car where the victim was seated); Vaughan & Sons, Inc. v. State (1983) 649 S.W. 2d. 677 (in which a corporation was

> On 11 August, 1972, the construction company was laying pipe for a sanitary sewer line. The procedure in laying the pipe consisted of having the back hoe excavate a trench which was approximately 9-12 feet in depth, and at the bottom was approximately 38-40 inches wide. Both sides rose vertically from the bottom for approximately five feet and after that were slightly sloped out to the surface where the width was seven and a half feet. The head pipe layer and assistant pipe layer were required to work at the bottom of the trench so as to fasten the pipe together. In other crews were the superintendent, foreman, back hoe operator, and the man on top whose duty was to look for signs of cave-ins. On the day in question, the side of this trench caved in killing the assistant pipe layer. The pipe layer was knocked aside and escaped an injury.
>
> The cave-in happened because of the failure to shore by means of sufficient strength sides of trenches in unstable and soft material as required by the Occupational Safety and Health Act of 1970.[97] There was a trench box on the site which was designed to protect workers in the trenches, but it was not in repair. The decision as to whether the trench in question was to be shored, had not been made by the superintendent; he had delegated the decision to the foreman. The foreman, in turn, delegated the decision to the back hoe operator who allegedly decided whether to shore or slope on the basis of the condition of the soil; he would shore 'if safety required it.' Since these employees' states of mind were regarded as gross negligence to the hazard, the construction company was charged with violating the Act by willfully failing to shore or slope the trench prior to cave in, resulting in death of the assistant pipe layer.

In this case, the construction company was held vicariously liable for the "grossly negligent" decision made by the back hoe operator as to whether the trench was to be shored. The decision had been delegated from the superintendent to the foreman, and from the foreman to him. As far as corporate fault is concerned, the fact that the grossly negligent decision was made by the back hoe operator implies: (1) that he had not been given proper training concerning the operation of excavation; and (2) that the delegation of the decision at issue might also be grossly negligent.

Under the delegation principle, as referred to in the previous chapter,[98] the principal authorises the agent to act on his/her behalf, leaving the principal liable for

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indicted for criminally negligent homicide committed by its employees who caused the death of two individuals in a motor vehicle collision); and Granite Construction Co. v. Supreme Court (1983) 197 Cal. Rptr. 3 (in which a construction company was charged with manslaughter after seven construction workers were killed in an accident at the power plant project).

97 Section 1926.652(b) of the Secretary's regulations (1972, 37 Fed. Reg. 27,552-55) gave the specific trenching requirements, providing:

> "Sides of trenches in unstable or soft material, 5 feet or more in depth, shall be shored, sheeted, braced, sloped, or otherwise supported by means of sufficient strength to protect the employees working within them."

cited in (1975) 510 F.2d. 78 at 79, n.1.

98 Chapter 2, text accompanying notes 223-225.

criminal acts of the agent. In other words, the principal cannot escape liability by delegating authority to act to the agent, as the responsibility for the acts of the agent remains in his/her hand. Given that the delegation was grossly negligent in this case, it is not only the conduct of the back hoe operator, but also the delegation system of the company for which the company should be held liable. In the context of corporate manslaughter, therefore, it is necessary to focus on the grossly negligent or reckless conduct of the lower-level employees as well as on their superior personnel's prior supervision of the quality of their working skills. As is often the case with corporate manslaughter, the source of risk is inherent in the corporate activities such as construction, production or transportation. Usually, some lower employees are in the closest position to it. If they are neither given proper training as to how to handle the source of risk nor adequately supervised by their superiors, there arises a strong likelihood that their trivial mistakes will trigger the catastrophic consequences.

The advantage of the vicarious liability doctrine is that account can be taken of some faults that exist at several levels in the corporate setting. Unlike the identification principle, it can be expected that the imposition of vicarious liability on a company may encourage superior personnel of the middle management to supervise their subordinate employees in order to prevent their violative conduct from occurring.[99]

The following case illustrates that the middle management was involved in the immediate cause by way of his failure to perform supervisory duties concerning the steel platform construction.

Case 15 (British Steel Plc.[100])

> In July 1990 the defendant company wanted to reposition a 7-5 tonne section of steel platform at their plant at Sheffield. The operation involved cutting the platform free of its support and moving it by crane to a new position. Subcontractors provided two men to carry out the repositioning of the platform, a welder and a plater. The subcontract was on a labour only basis, with equipment and supervision being provided by the company. A section engineer in the employment of the company was responsible for the supervision

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99 See American Law Institute, *Model Penal Code and Commentaries* (*Official Draft and Revised Comment*) (1985, Philadelphia) [hereinafter cited as *MPC*], Vol. 1, pp. 338-339.

100 [1995] ICR 586. See also Ridley & Dunford, *Killing*, *supra* note 25 at pp. 104-106; Sullivan, *Attribution*, *supra* note 9 at pp. 540-541.

of the repositioning of the platform. On 29 July 1990, the two men cut the platform free of nearly all its supports, but neglected to secure it to a crane or by means of temporary props so that the platform was unstable. When the plater stepped on to the platform, it collapsed and fell on the welder who was working immediately underneath it, killing him.

The company was charged with the breach of the duty imposed by section 3 (1) of the Health and Safety at Work etc Act 1974.[101] The prosecution's case was that although the defendant company's delegation of responsibility for supervision to the experienced section engineer was perfectly acceptable, he did not plan and supervise the operation properly. Moreover, if, the prosecution argued, he had made proper visits to the site, he would have detected that essential safeguards were not being followed. The issue was whether such fault on the part of the section engineer could be imputed to the company; that is to say, whether the Act should be construed as imposing vicarious liability.

In rejecting both the application of the identification principle and the availability of due diligence defence which does not appear in the section, the court interpreted the section as imposing an absolute prohibition and creating the employer's duty to his own employees to avert risks to health and safety. The defendant company was fined accordingly.

In this case, the defendant company, as an employer, was held vicariously liable for the section engineer's improper discharge of supervisory duties regarding the repositioning operation at issue. Whereas the welder and plater's failure to stabilise the platform was the immediate cause of the collapse of the platform, the court imputed the section engineer's fault as to clear instructions and periodic inspections to the company. The company had a legal duty to eliminate the risks, imposed by section 3 (1) of the Health and Safety at Work etc Act 1974, to the welder and plater, so that their fault could not be imputed to the company.

3.5. Limitations on Anthropomorphic Models for Corporate Manslaughter

It is suggested that the doctrine of corporate vicarious liability is a creature of statute and statutory construction,[102] or "the creation of expediency rather than careful reflection."[103] Today, it survives because of the absence of the creation and implementation of an

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101 Section 3(1) of the Act provides:

> "It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practical, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety."

102 R. Card, *Card, Cross & Jones Criminal Law* (1998, 14th ed., Butterworths, London), para. 21.52.

103 J. Moore, "Corporate Culpability under the Federal Sentencing Guidelines" (1992) 34 *Arizona Law Review* 743 at 759.

alternative theory of liability,[104] apart from the identification principle. Thus, it follows that "the only way in which to satisfy the requirement of the criminal law is to focus exclusively on a determination of the agent's culpability."[105]

This doctrine has been criticised by several commentators for the scope of its application, called "inclusiveness."[106] It imputes to the corporation only the act and *mens rea* of the particular agent who committed the crime, but does not consider fault of other corporate agents. By imputing fault of any corporate agent to the corporation, this "imputed fault theory" blurs a clear distinction between corporate culpability for crimes committed with the encouragement of senior management, in accordance with corporate policies or procedures, and that for crimes committed by "rogue employees" whose act had been prohibited by corporate policy or could not have been prevented by careful supervision.[107] It is for this reason that the vicarious liability doctrine has been subject to criticism of unfair over-inclusiveness.[108]

In the context of corporate manslaughter, the over-inclusive nature of the vicarious liability doctrine poses serious legal problems. For the corporation to be held liable for manslaughter, as suggested in the Welansky case (*Case 9*),[109] there should be a causal link between the source of risk and corporate fault. The difficult issue may arise when the source of risk or immediate cause is triggered by the third party, but some

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104 W.S. Laufer, "Corporate Bodies and Guilty Minds" (1994) 43 *Emory Law Journal* 647 at 654.

105 *Ibid.*

106 See, for example, Laufer, *ibid.* at pp. 659-664; Moore, *supra* note 103 at pp. 758-764; Clarkson, *Culpability*, *supra* note 38; Colvin, *supra* note 6 at 8.

107 Moore, *ibid.*

108 There have been numerous cases reported in the US. in which corporations were held liable for its agents whose conduct had expressly been prohibited by them. See, for example, US v. Basic Construction Co. (1983, 4th Cir.) 711 F.2d. 570, *cert. denied*, 464 U.S. 956; US v. Automated Medical Lab. (1985, 4th Cir.) 770 F.2d. 399; US v. Hilton Hotels Co. (1972, 9th Cir.) 467 F.2d. 1000, *cert. denied sub nom.* Western International Hotel v. US (1973) 409 U.S. 1125; US v. American Radiator & Standard Sanitary Co. (1970, 3rd Cir.), 433 F.2d. 174, *cert. denied*, (1971) 401 U.S. 948; Old Monastery Co. v. US (1945, 4th Cir.) 147 F.2d. 905, *cert. denied*, 326 U.S. 734. For a general discussion of corporate liability for the agent's acts against corporate policy, see, in particular, J.V. Dolan & R.S. Rebeck, "Corporate Criminal Liability for Acts in Violation of Company Policy" (1962) 50 *Georgetown Law Journal* 547.

109 *Supra* text accompanying notes 47-56, in particular, n.53.

fault on the part of the company or its individual agents contributes to the victim's death. In such a case, the vicarious liability doctrine severely holds the company liable for the victim's death even when no individual of the company could have foreseen the chain of events or the consequences. The following case provides a good example.

Case 16 (State v. Pacific Powder Co.[110])

> On 7 August, 1959, a truck owned by the dynamite manufacturing company, operated by its driver, and loaded with two tons of Dynamite and four and one-half tons of Nitro-Carbo Nitrate, was parked on a public street adjacent to a wooded building while the driver left to get something to eat. While the truck was parked unattended near the wooden building, the wooden building became engulfed in an extremely hot fire, lit up the truck's cargo, and resulted in a tremendous blast. The truck's explosion caused the death of a bystander. Considering the nature of the cargo in the truck at issue, the driver's acts, in leaving the truck unattended at the time and place in concurrence with the fact that the wooden building caught fire, were viewed as acts without due caution and circumspection, so that the company was indicted for involuntary manslaughter.

It is not evident from the case report what was the immediate cause of fire that occurred at the wooden building, adjacent to the public street on which a truck issue was parked at the explosion. What was made clear at trial was the driver's conduct "in leaving the truck unattended at the time and place in concurrence with" the building's fire. This conduct should be considered negligent, and the defendant company might also be to blame for not properly training him prior to the incident. Neither the company nor the driver, however, did anything to do with or foresaw the immediate cause of fire. It is certain that the victim's death could have been avoided if the driver acted "with due caution and circumspection," but any preventive steps, such as organising a safe system which was considered in the Welansky, Warner-Lambert and P & O cases (*Cases 9, 10 and 12* respectively), were not available to the company in order to prevent the driver's conduct from causing the prohibited consequences. In this sense, the vicarious liability doctrine that imputes to the company the acts and fault of the lowest-level employee results in too much liability in some cases.

As suggested in the context of the identification principle,[111] the problem of

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110 (1961) 360 P. 2d. 530. See also Rodella, *supra* note 23 at pp. 104-105; Wragg, *supra* note 23 at pp. 72-73; Hickey, *supra* note 23 at pp. 473-478; D.S. Anderson, *supra* note 23 at 399; Helverson; *supra* note 23 at 973; Uffelman, *supra* note 23 at pp. 587-589.

111 *Supra* text accompanying note 39.

over-inclusiveness would be resolved by construing the requirements of "the scope of employment" and of "benefit" narrowly, so as to exclude the acts that are not authorised or permitted by senior management.[112] Unlike the case of the identification principle, however, this resolution could easily be marred simply by declaring that the company had formal or nominal policy against the agent's act.[113] The requirements of "the scope of employment" and "benefit" thus provide "no protection against overinclusiveness."[114]

Another troubling feature of the vicarious liability doctrine is concerned with its under-inclusiveness. There are some situations where it is obvious that the prohibited consequences are caused by the company itself, but there is no individual fault to impute, or where the consequences are caused by the innocent employee whose illegal conduct is tolerated or encouraged by the company. Some cases which illustrate such situations are found in the context of corporate manslaughter.[115]

Case 17 (Commonwealth v. McIlwain School Bus Lines, Inc.[116])

> On 3 April, 1978, a school bus owned by the corporation and operated by one of its employees, ran over and killed a 6-year-old school girl when she got off the bus and was crossing in front of the bus. The corporation failed to equip the bus with properly adjusted mirrors on the front and rear of the bus, which would have enabled the bus operator to see the victim after she had left the bus. This failure was in violation of the Motor Vehicle

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112 For detailed arguments of the vicarious liability doctrine in relation to the "scope of employment" and "benefit" requirements, see, in particular, Anonymous, "Developments in the Law - Corporate Crime: Regulating Corporate Behavior through Criminal Sanctions" (1979) 92 *Harvard Law Review* 1227 [hereinafter cited as *Developments in the Law*] at pp. 1246-1251; M.E. Tigar, "It Does the Crime But Not the Time: Corporate Criminal Liability in Federal Law" (1990) 17 *American Journal of Criminal Law* 211 at pp. 218-226.

Another solution to the problem of over-inclusiveness may be the availability of a due diligence defence to the company, providing it an exculpatory opportunity when it took any reasonable steps against the acts of the agent. Full arguments as to the corporate liability model based on a due diligence defence will be advanced in the next chapter.

113 Moore, *supra* note 103 at pp. 760-761. See also Fisse, *supra* note 87 at 607.

114 Moore, *ibid.* at 760.

115 See also State v. Lehigh Valley Railroad Co. (1917) 103 A. 685; (1919) 106 A. 23, the case in which a railroad company and others were indicted for manslaughter after some railroad locomotives that were, with the gross and flagrant negligence by the company, loaded with excessive quantities of highly explosive ammunition, exploded and killed a bystander.

116 (1980) 423 A. 2d. 413. See also L.C. Anderson, *supra* note 23 at 243; Stoner, *supra* note 23 at 1283.

Code.[117] The corporation was charged with the offence of homicide by vehicle, under the statute prescribing liability of the unintentional killing of a person while engaging in the violation of the Motor Vehicle Code when the violation was the cause of death of another person.[118]

Case 18 (Commonwealth v. Fortner LP Gas Co.[119])

On 13 March, 1979, a school bus was delivering children to their homes. When 10-year-old and 6-year-old school children alighted from the bus and were attempting to cross the highway, a truck owned by the corporation came on the scene. The truck driver, one of the corporate employees, observed the bus about 400 feet ahead, geared down and applied the brakes. However, because of the truck's grossly defective brakes, the truck failed to stop and struck both children, one of them being injured, and the other being killed instantly. The corporation was indicted by the grand jury for manslaughter in the second degree with its basis in wantonness.

What is common in both cases is the fact that the victims' deaths were caused by the drivers of the vehicles which had not properly been maintained. Mirrors on the front and rear of the bus were not adequately installed in the McIlwain School Bus case (*Case 17*), and brakes of the truck were defective in the Fortner LP Gas case (*Case 18*). It was the corporations in both cases that were in charge of the maintenance of the vehicles and permitted them to be put into use. Thus, the conduct of the drivers should have been treated as the trigger of the victims' death, as a result of the companies' neglect of maintenance.[120]

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117 75 Pa.C.S.A. § 4551 (Act of June 17, 1976, P.L. 162, No. 81, §1, eff. July 1, 1977), cited in (1980) 423 A. 2d. 413 at 415, providing:

> "(a) General Rule. - All school buses and all other vehicles used in the transportation of school children, owned by or under contract with any school district or parochial or private school, shall conform to standards prescribed by the department. Regulations shall be promulgated by the department governing the safe design, construction, equipment and operation of vehicles engaged in the transportation of school children.
> (b) Violation and penalty. - No person shall operate or permit the operation of a vehicle of a type specified in this subchapter which is not in compliance with the requirements of this subchapter or applicable regulations issued under this subchapter. Violation of this section constitutes a summary offense punishable by a fine of not less than $50 nor more than $100."

118 75 Pa.C.S.A. § 3732, cited in *ibid.* at 414, providing:

> "Any person who unintentionally causes the death of another person while engaged in the violation of any law of the Commonwealth or municipal ordinance applying to the operation or use of a vehicle or to the regulation of traffic is guilty of homicide by vehicle, a misdemeanour of the first degree, when the violation is the cause of death."

119 (1980) 610 S.W. 2d. 941. See also Rodella, *supra* note 23 at pp. 103-104.

120 A. Foerschler, "Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct" (1990) 78 *California Law Review* 1287 at 1307.

However, unlike the Denbo case (*Case 2*), no attempt was made to prove that senior management was involved in improper maintenance of the vehicle at issue, so that the basis of corporate liability in both cases was obviously the act of the drivers. If the vicarious liability doctrine was applied in these cases, some confusion would arise as to whose fault should have been imputed to the company. In the circumstances in which the vehicle was not properly maintained, the driver could not have avoided the prohibited consequences. As suggested in the cases of Denbo (*Case 2*) and Van Schaik (*Case 13*), it would also be necessary to prove some fault on the part of one of the controlling officers who incurred legal duties, imposed by the relevant statute on the company, to maintain a safe working environment and to establish an adequate maintenance system.

On the other hand, as found in Warner-Lambert case (*Case 10*), the controlling officers are usually remote from the day-to-day or specific operations of corporate business and, hence, are unlikely to have the requisite mental states. As a result, when the victim's death is caused by the lower employee's conduct which has been tolerated or ignored by his/her controlling officers, the company can unfairly escape liability for manslaughter.

In conclusion, criticisms that address the scope of such anthropomorphic models as the vicarious liability doctrine and identification principle are reducible to the dubious link between individual conduct and corporate fault.[121] As several cases of corporate manslaughter have hitherto demonstrated, there would still be room for assessing corporate fault even when no culpable individual conduct is found. There may be three possible solutions to overcome the issues of under- and over-inclusiveness.

The first way to cope with the weakness of the anthropomorphic approaches is to remove the link between individual and corporate liability, which has been adhered to by the English court. Turner J.'s establishment of the derivative nature of corporate liability in the P & O case is not a logical consequence from the fact that a company can physically act only through the acts of its agent. When the acts of one or some of the

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[121] Laufer, *supra* note 104 at 659.

individual agents or controlling officers cause the prohibited consequences, there may be fault on the part of the actor(s). But the individual acts or/and fault suggest "the presence of fault on a more widespread organisational basis."[122] To hold a company itself liable for such organisational or collective fault, there is no need for the individual's acts and fault to be sufficiently culpable for his/her personal liability.[123] It is for this reason that the American courts have developed the collective knowledge doctrine, which enables them to convict the company of crimes requiring knowledge on the basis of aggregating an innocent piece of knowledge of several employees as a group, even though no single employee possesses sufficient information that the crime is committed. The next chapter will critically examine this doctrine.

The second solution has been suggested by several organisation theorists who identify corporate actions and fault as a product of the organisational structure and culture, rather than as a mere aggregate of each of individual conduct. They argue that the corporation have some distinct features from individual conduct and fault so that it can meet the fault requirement of the crime without resort to the concept of imputation of individual fault to it. Both the collective knowledge doctrine and organisation theories share the view that individual liability is not required to hold the company liable. Nevertheless, the organisation theories place their stress on the fact that corporate actions are not reducible to individual intentions. The next chapter will also examine the features of organisational actions and fault which the organisation theorists suggest and will critically analyse them when transformed into the legal framework of corporate liability.

The third method of resolving the derivative problem of corporate liability is

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122 Fisse, *supra* note 87 at p. 603.

123 There are a number of cases in the US. in which the jury render inconsistent verdicts when a company and its agents are tried together, acquitting corporate agents, but holding the corporation liable. See, for example, US v. General Motors Co. (1941, 7th Cir.) 212 F. 2d. 376, *cert. denied*, 314 U.S. 613; US v. Austin-Bagley Co. (1929, 2d Cir.) 31 F. 2d. 229, *cert.* denied, 279 U.S. 863; American Medical Association v. US (1942, D.C. Cir.) 130 F. 2d. 233, *aff'd*, (1943) 317 U.S. 519; Imperial Meat Co. v. US (1963, 10th Cir.) 316 F. 2d. 435, *cert. denied*, 375 U.S. 820; Pevely Dairy Co. v. US (1949, 8th Cir.) 178 F. 2d. 363, *cert. denied,* (1950) 339 U.S. 942. On the subject of inconsistent verdicts, see, for example, *Developments in the Law*, *supra* note 112 at pp. 1248-1249; *MPC*, *supra* note 99 at pp. 336-337; Moore, *supra* note 103 at pp. 762-763.

reconstructing the fundamental concepts of *actus reus* and *mens rea* in cases of corporate manslaughter. As demonstrated in the previous chapter, the restrictions to the development of corporate liability in the history of English law were all concerned with corporate incapacity for conduct, mental states and punishment. The reason why such concepts as *actus reus* and *mens rea* were considered unfit for corporations is understandable. The idea of corporate criminal liability has been conceived of as an exception to conventional criminal law theories for a long time, during which the concepts of *actus reus* and *mens rea* have developed through numerous cases in which only human individuals were the target of imposing criminal responsibility.[124] As a result, too much emphasis has been placed upon both the physical aspect of the conduct requirement as part of *actus reus* and upon the subjective aspect of *mens rea*. Since the corporation is apparently devoid of "body" to perform a physical act and of mental faculties or "soul" to entertain guilt, the application of such humanly tailored concepts to companies has inevitably proved problematic.

However, once corporations become the target, as well as human individuals, for imposing criminal responsibility, necessary steps should be taken to revise the concepts of *actus reus* and *mens rea* to cover the liability of both natural and legal "persons." In its attempt to tailor these concepts to corporate offenders, Chapter 5 will offer the appropriate model of corporate liability for manslaughter.

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[124] See Gobert, *supra* note 34 at 394, cited in Chapter 2, n.10. The best expression for frustration of the idea of corporate liability that appeared in the history of English law may be the invocation of Edward, First Baron Thurlow (1731-1806), Lord Chancellor that a corporation has "no soul to be dammed, and no body to be kicked." The quote was first cited in M.A. King, *Public Policy and the Corporation* (1977, Chapman & Hall, London), p. 1; and was then given publicity by J.C. Coffee, ""No Soul to Damn: No Body to Kick": An Unscandarized Inquiry into the Problem of Corporate Punishment" (1981) 79 *Michigan Law Review* 386. Since then, this phrase has been in some commentators' favour to symbolise theoretical problems of corporate liability in criminal law, such as Clarkson, *Kicking*, *supra* note 25; and Ridley & Dunford, *Responsibility*, *supra* note 25. For additional information of this Lord Chancellor's phrase, see also H.L. Mencken, *A New Dictionary of Quotations on Historical Principles from Ancient and Modern Sources* (1942, Alfred A. Knopf, New York), p. 223.

CHAPTER 4

ORGANISATION THEORIES AND CORPORATE FAULT

4.1. Models of Corporate Fault

Generally, four models of corporate fault have hitherto developed both in the case reports and in the academic literature,[1] each of which is noted for its denial of the derivative nature of corporate liability. As will be outlined below, these models seem to have certain advantages over the anthropomorphic models discussed in the previous chapters, particularly in cases where no individual's fault is proved. However, it has been suggested that each suffers flaws in its legal framework. Section 4.2. examines the adequacy of each model in the context of several corporate manslaughter cases described in the previous chapter. Section 4.3. outlines criticisms that have been made by commentators against the four models. Finally, Section 4.4. critically considers the criticisms against the existing theories of corporate fault, and raises more fundamental, but often neglected, questions as to the way that a company should be held liable.

4.1.1. The Aggregation Theory

The aggregation theory, which was rejected by Bingham L.J. in the English case R v. HM Coroners for East Kent,[2] originates from the American collective knowledge

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1 Laufer, too, counts four models of corporate culpability in his article. See W.S. Laufer, "Corporate Bodies and Guilty Minds" (1994) 43 *Emory Law Journal* 647 at pp. 664-668. While he has analysed "corporate ethos" and "corporate policy" models separately, each of whose content will be described in the subsequent subsections, and has not included the aggregation theory in the models, this chapter treats both corporate policy and corporate ethos as the same, and analyses the aggregation theory along with corporate policy, proactive fault, and reactive fault models. The last three are called here "organisation theories." See *infra* text accompanying notes 26-27.

The other model of corporate fault is a managerial failure approach that is proposed in the Law Commission, *Legislating the Criminal Code: Involuntary Manslaughter* (1996, Law Commission No. 237, HMSO, London). Since this approach involves several theoretical issues that are directly related to the central task of the next chapter (namely, reconstructing relevant criminal law concepts), its detailed analysis and discussion will be presented therein.

2 [1989] 88 Crim. App. R. 10, referred to in the previous chapter, text accompanying notes 88-89.

doctrine.[3] A vivid disparity between the English court's rejection and the American court's general acceptance of this doctrine should be understood when attention is paid to the natures of both the identification principle and the vicarious liability doctrine. Under the identification principle, the corporation is held *directly* or *personally* liable for the acts and state of mind of one of its controlling officers as if it committed a *mens rea* offence by itself. By contrast, the vicarious liability doctrine holds the corporation liable for the acts and state of mind of *another* person.

As far as *mens rea* offences are concerned, the English court has not clearly extended the application of the vicarious liability doctrine to corporate liability, so that the corporation is still immune from liability for the acts of another person, namely, a lower-level employee. In these circumstances, the aggregation theory finds no place in English law because "[a] case against a personal defendant cannot be fortified by evidence against another defendant."[4] Under the American federal law, however,

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3 For a full account of the collective knowledge doctrine in American and other common law jurisdictions, see, for example, M.E. Tigar, "It Does the Crime But Not the Time: Corporate Criminal Liability in Federal Law" (1990) 17 *American Journal of Criminal Law* 211 at pp. 221-226; E. Colvin, "Corporate Personality and Criminal Liability" (1995) 6 *Criminal Law Forum* 1 [hereinafter cited as *Corporate Personality*] at pp. 18-23; A. Rogozino, "Replacing the Collective Knowledge Doctrine with a Better Theory for Establishing Corporate Mens Rea: The Duty Stratification Approach" (1995) 24 *Southwestern University Law Review* 423; R.S. Gruner, *Corporate Crime and Sentencing* (1994, The Michie Co., Virginia), ch. 4; A. Zarky, *Defending the Corporation in Criminal Prosecutions: A Legal and Practical Guide to the Responsible Corporate Officer and Collective Knowledge Doctrines* (1990, The Bureau of National Affairs, Inc., Washington D.C.), pp. 35-56.

As described later, this doctrine allows the court to gather several corporate employees' knowledge as to the relevant facts to hold a company liable as if the company had possessed all pieces of knowledge. Gruner refers to this doctrine as "the collective knowledge and action" because it actually relates not only to several pieces of knowledge of corporate employees but also to their conduct governed by their knowledge. *Ibid.* This implies that this doctrine is an extended version of the vicarious liability doctrine in the sense that any relevant knowledge and conduct, whether criminal or innocent, of any corporate agents are utilised to impose criminal liability on a company.

For the sake of convenience, the conventional term "the collective knowledge doctrine" is used in this thesis.

4 *Per* Bingham L.J. in R. v. HM Coroner for East Kent, [1989] 88 Crim. App. R. 10 at 16, cited in the previous chapter, text accompanying note 89. Thus, roughly speaking, the collective knowledge doctrine or aggregation theory is more likely to thrive with the general acceptance of the vicarious liability doctrine than with the identification principle. In other words, there is little likelihood that the aggregation theory will be accepted by the English court in the future, unless the identification principle is either abolished or modified.

The other possibility of the acceptance of the aggregation theory is to gather only senior or controlling officers' conduct and mental states to impute the company. This point will be referred to in *infra* note 24.

corporate vicarious liability both for strict liability and for *mens rea* offences is well established.[5] The American courts have shown no hesitation in imputing to corporate defendants the state of mind and conduct of *any* individual offenders. Even when the individual offender is found innocent by the jury, as described in the previous chapter,[6] the corporate defendant may still be held vicariously liable for his/her conduct.

Under the collective knowledge doctrine which adds more than two innocent minds up to a guilty one, the company is to be held liable even when there is no proof that any single agent intended to commit the offence or knew that his/her conduct had led to the violation . The knowledge and conduct of multiple agents is imputed to the corporation "as if the collective knowledge and actions were held and undertaken by a single party."[7] The derivative nature of corporate liability, which is inherent in the identification principle, is totally denied in that the collective knowledge doctrine forms the corporate culpable knowledge by combining a piece of innocent knowledge of corporate agents. The gist of this doctrine is illustrated in the following two American

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5 For a general discussion of corporate criminal liability in the US., see, for example, Tigar, *supra* note 3; Gruner, *supra* note 3, chs. 2, 5 and 7; H.L. Brown, "Vicarious Criminal Liability of Corporations for the Acts of Their Employees and Agents" (1995) 41 *Loyola Law Review* 279; J.C. Coffee, Jr., "Corporate Criminal Responsibility" in S.H. Kadish (ed.), *Encyclopaedia of Crime and Justice* (1983, The Free Press, New York), Vol. 1, pp. 253; C.J. Walsh & A. Pyrich, "Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save Its Soul?" (1995) 47 *Rutgers Law Review* 605; C.L. Griffin, "Corporate Scienter under the Securities Exchange Act of 1934" (1989) 45 *Brigham Young University Law Review* 1227; V.S. Khanna, "Corporate Criminal Liability: What Purpose Does It Serve? (1996) 109 *Harvard Law Review* 1477; H.M. Friedman, "Some Reflections on the Corporation as Criminal Defendant" (1979) 55 *Notre Dame Lawyer* 173; Anonymous, "Developments in the Law - Corporate Crime: Regulating Corporate Behavior through Criminal Sanctions" (1979) 92 *Harvard Law Review* 1227 [hereinafter cited as *Developments in the Law*]; J.R. Elkins, "Corporations and the Criminal Law: An Uneasy Alliance" (1976) 65 *Kentucky Law Journal* 73; Anonymous, "Corporate Criminal Liability" (1973) 68 *Northwestern University Law Review* 870; S.R. Miller & L.C. Levine, "Recent Developments in Corporate Criminal Liability" (1984) 24 *Santa Clara Law Review* 41; K.F. Brickey, "Corporate Criminal Accountability: A Brief History and an Observation" (1982) 60 *Washington University Law Quarterly* 393; *Corporate Criminal Liability - A Treatise on the Criminal Liability of Corporations, Their Officers and Agents* (1984, 1st ed., Callaghan, Illinois); and *Corporate and White Collar Crime - Cases and Materials* (1995, 2nd ed., Little Brown and Co., Boston).

6 Chapter 3, n.123.

7 Gruner, *supra* note 3 at p. 263.

cases.[8]

In US v. T.I.M.E.-D.C., Inc.,[9] an interstate motor carrier corporation was charged with violating the Federal Highway Administration Regulations which prohibited motor carriers from requiring or permitting "a driver to operate a motor vehicle while the driver's ability or alertness was so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him to begin or continue to operate the motor vehicle."[10] Since the company had experienced an increase in absenteeism at its Winchester terminal (Virginia) which had caused severe economic problems,[11] it instituted and implemented a new policy regarding the process of marking a driver's name off the roster. In order to discourage and decrease the absenteeism, the new program required a driver to submit a doctor's slip or similar certification of his illness, without which an unexcused absence letter would issue, stating that the absence on a particular day for sickness was unexcused. If the driver submitted verification of his illness, however, the unexcused absence letter would be expunged from his record, and a second letter excusing the absence would be sent to the driver. It was alleged that

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8 See also US v. Stockyards Terminal Ry. Co. (1910, 8th Cir.) 178 F.19; Browning v. Fidelity Trust Co. (1918, 3d Cir.) 250 F.321; Sarna v. American Bosch Magneto Co. (1935, Mass.) 195 N.E.328; Paloeian v. Day (1938, Mass.) 13 N.E.2d 398; Inland Freight Lines v. US (1951, 10th Cir.) 191 F.2d 313; Slater v. Missouri Edison Co. (1952, Mo) 245 S.W.2d 457; Walker v. State (1953, Ga.) 78 S.E2d 545; Woodmont, Inc. v. Daniels (1959, 10th Cir.) 274 F.2d 132; Gem City Motors, Inc. v. Minton (1964, Ga.) 137 S.E.2d 522; US v. Sawyer Transport, Inc. (1971) 337 F.Supp.29; People v. American Medical Centers of Mich. (1982, Mich.) 324 N.W.2d 782; Camacho v. Bowling (1983) 562 F.Supp.1012; US v. Shortt Accountancy Corp. (1986, 9th Cir.) 785 F.2d 1448. But see First Equity Corp. v. Standard & Poor's Corp. (1988 S.D.N.Y.) 690 F.Supp.256 ("While it is not disputed that a corporation may be charged with the collective knowledge of its employees, it does not follow that the corporation may be deemed to have a culpable state of mind when that state of mind is possessed by no single employee. A corporation can be held to have a particular state of mind only when that state of mind is possessed by a single individual."), citing Kern Oil & Refining Co. v. Tenneco Oil Co. (1986, 9th Cir.) 792 F.2d 1380, pp. 1386-87, *cert. denied*, (1987) 480 U.S. 906.

9 (1974) 381 F.Supp.730.

10 Interstate Commerce Act, Part II; Motor Carriers, 49 U.S.C. § 322(a) (1963) (repealed 1978), cited in *ibid.* at 733. Section 322(a) of the Act imposed criminal penalties for the knowing and willful violation of any of the regulations imposed by the Highway Administrations. *Ibid.*

11 "The Winchester, Virginia terminal receives transport orders at approximately 6 p.m. for runs to begin as early as 7 p.m. If drivers telephone the Company's dispatcher and mark off during the afternoon there may not be enough drivers for the runs resulting in significant delays in delivery." *Ibid.* at 733, n.2.

the company refrained from fully notifying the drivers of the details of this new policy, producing "an aura of confusion and concern which would coerce drivers into refraining from marking off due to illness."[12]

The first incident occurred on 8 September 1972, when a line driver telephoned the company's dispatcher and asked that he be marked off the roster that evening because he had injured his back. The dispatcher told him that his absence would be considered unexcused, but allegedly did not explained to the driver that the absence would be excused if the driver submitted doctor verification. For fear of the effect of the unexcused absence letter, the driver then requested to be placed back in the lineup.[13]

The second incident occurred on 21 October 1972, when another driver telephoned the same dispatcher on that evening and asked that he be marked off the roster because he had an ear infection and was going to a doctor. The dispatcher responded in the same way as the first incident, and three hours later, the driver telephoned the company (the other dispatcher) and requested to be reinstated for duty. This time, however, the driver subsequently became too ill to continue his work and was advised by the company to obtain medical treatment.

The central issue was whether the company had knowledge that the driver was ill, so as to constitute the knowing and willful violation of the Act. Because different dispatchers were on duty when the sick call was made and when the drivers later reported for work, pertinent facts were not acquired by one specific individual who would fully comprehend their significance. One dispatcher knew that the driver was ill but did not know that he would go back in the lineup; the other dispatcher knew that the driver reported to work, but did not know that the driver was ill. The court, however, held that the acts and knowledge of the corporate employees within the scope of their employment are imputed to the company, which is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act

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12 *Ibid.* at 736.

13 *Ibid.* at pp. 733-735.

accordingly.[14] That is, by combining several dispatchers' knowledge as to the relevant facts, the court viewed the defendant company as acting knowingly and willfully.

Again, in US v. Bank of New England, N.A.,[15] the Bank of New England was charged with thirty-one violations of the Currency Transaction Reporting Act, which required banks to file Currency Transaction Report (CTRs) within fifteen days of customer currency transactions exceeding $10,000.[16] A customer came to a bank teller's window to request a number of counter checks which he would then make payable to cash for sum varying between $5,000 and $9,000. On each occasion the customer simultaneously presented to the teller between two and four counter checks, none of which individually amounted to $10,000. Each check was reported separately as an "item" on the bank's settlement sheets. Once the checks were processed, he would receive in a single transfer from the teller the lump sum of cash which exceeded $10,000. The bank failed to file CTRs on any of these transactions.[17]

It was revealed at trial that the teller was unaware of the Act providing reporting requirements for financial institutions for domestic coins and currency transactions which exceeded $10,000, but her supervisor, the head teller, and the branch manager knew of the CTR filing obligations imposed by the Act. Nonetheless, they did not know the fact that the customer's transactions, multiple deposits that were aggregated for the purpose of the reporting requirement, would be reportable as required by the Act. On the other hand, the bank's project coordinator who worked in the bank's main office knew that the meaning of reportable transactions of the Act was expanded to include multiple transactions which would aggregate more than $10,000, but had no knowledge that the transactions by the customer at issue occurred.[18]

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14 *Ibid.* at 738.

15 (1987, 1st Cir.) F.2d 844.

16 31 U.S.C. §§5311-5322 (1988 & Supp. V 1993). § 5322 provides criminal penalties for violations of the Act.

17 (1987, 1st Cir.) F.2d 844 at 848.

18 *Ibid.* at pp. 857-858.

None of these bank employees' knowledge individually amounted to willfulness as required by the Act: the teller's knowledge as to the occurrence of multiple deposits exceeding $10,000 as a result of the aggregation; the head teller and branch manager's knowledge of the reporting requirement; and the bank's coordinator's knowledge that multiple deposits should be aggregated. The willfulness requirement would be fulfilled, however, by combining these fragments of knowledge,[19] because the court believed that "the acts of a corporation are, after all, simply the acts of all of its employees operating within the scope of their employment."[20] That is to say, even when no single individual possessed the requisite knowledge of the violation, the company could still be held liable for an offence requiring specific intent which, under the collective knowledge doctrine, amounted to a hypothetical sum of each employee's fragment of knowledge.

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[19] The issue of willfulness concerning the collective knowledge doctrine was addressed by the trial judge that instructed the jury as follows:

> "There is a similar double business with respect to the concept of willfulness with respect to the bank. In deciding whether the bank acted willfully, ... you have to look first at the conduct of all employees and officers, and, second, at what the bank did or did not as an institution. The bank is deemed to have acted willfully if one of its employees in the scope of his employment acted willfully. So, if you find that an employee willfully failed to do what was necessary to file these reports, then that is deemed to be the act of the bank, and the bank is deemed to have willfully failed to file....
>
> Alternatively, the bank as an institution has certain responsibilities; as an organization, it has certain responsibilities. And you will have to determined whether the bank as an organization consciously avoided leaning about and observing CTR requirements. The Government to prove the bank guilty on this theory, has to show that its failure to file was the result of some flagrant organizational indifference. In this connection, you should look at the evidence as to the bank's effort, if any, to inform its employees of the law; its effort to check on their compliance; its response to various bits of information....; its policies, and how it carried out its stated policies....
>
> If you find that the Government has proven with respect to any transaction either that an employee within the scope of his employment willfully failed to file a required report or that the bank was fragrantly indifferent to its obligations, then you may find that the bank has willfully failed to file the required reports."

Ibid. at 855.

[20] *Ibid.* at 856. The jury was instructed by the trial judge concerning the collective knowledge doctrine as follows:

> "[Y]ou have to look at the bank as an institution. As such, its knowledge is the sum of the knowledge of all of the employees. That is, the bank's knowledge is the totality of what all of the employees know within the scope of their employment. So, if Employee A knows one facet of the currency reporting requirement, B knows another facet of it, and C a third facet of it, the bank knows them all. So if you find an employee within the scope of his employment knew that CTRs had to be filed, even if multiple checks are used, the bank is deemed to know it. The bank is also deemed to know it if each of several employees knew a part of that requirements and the sum of what the separate employees knew amounted to knowledge that such a requirement existed."

Ibid. at 855.

The court held that:

> "A collective knowledge instruction is entirely appropriate in the context of corporate criminal liability.... Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation's knowledge of a particular operation. It is irrelevant whether employees administrating one component of an operation know the specific activities of employees administrating another aspect of the operation...."[21]

It is interesting to note that the court in this case rejected the bank's argument that the collective knowledge doctrine would actually hold a company liable for "negligently maintaining a poor communications network."[22] Yet, some commentators base this doctrine's justification upon the company's failure to integrate, coordinate and analyse information held by several employees so as to help all of the corporate agents avoid illegal conduct.[23] It is certain that the effect of this doctrine would encourage corporate agents, in particular, corporate officers or decision-makers, to be more conscious of transmitting the relevant information held by some employees to the others engaging in criminal conduct.[24] The aggregation of a piece of knowledge of several employees would serve as some factors to demonstrate a company's defective communication

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21 *Ibid.* at 856.

22 *Ibid.*

23 See, for example, Gruner, *supra* note 3, §4.1.2; Ragozino, *supra* note 3 at 438.

24 Gruner emphases that the collective knowledge doctrine's main purpose is to encourage "firms to do better with the information they have, and not to institute new information gathering practices." *Ibid.* at p. 284. On the other hand, Fisse proposes that a company should still be held liable for the offence performed by middle- or lower-level employees if it "did not have in place a system or procedure calculated to ensure that warnings of the suspected or anticipated commission of the offence.... would promptly be communicated to the board of directors.... or managing director." B. Fisse, "The Attribution of Criminal Liability to Corporations: A Statutory Model" (1991) 13 *Sydney Law Review* 277 [hereinafter cited as *A Statutory Model*] at pp. 286-288. Moreover, Smith has suggested the application of the aggregation theory to offences of negligence, although they are not in favour of its application in offences requiring the other types of subjective mental states. J.C. Smith, *Smith and Hogan Criminal Law* (1996, 8th ed., Butterworths, London), p. 189, stating that:

> "The company owes a duty of care and if its operation falls below the standard required it is guilty of gross negligence. A series of minor failures by officers of the company might add up to a gross breach by the company of its duty of care."

It is to be noted, however, that Smith's interest in aggregating several individual's fault consists of three points. At first, the aggregation theory should be applicable only to (gross) negligence so that he is not necessarily in favour of American collective *knowledge* doctrine in the context of corporate liability. Next, he is concerned only with the negligence of senior officers, not middle- or lower-level employees. Finally, therefore, the aggregation theory is, he believes, an extended version of identification principle, not vicarious liability doctrine. *Ibid.*

system between top management and middle- or lower-level employees. Viewed in this light, the aggregation theory (or the collective knowledge doctrine) is not only aimed at forming the requisite subjective mental state of the company, but also at blaming it for not taking precautious or corrective measures, in terms of a poor communication system, against its employee's offence.

4.1.2. Corporate Policy

Several commentators have critically responded to the derivative nature of corporate liability, as American courts have in terms of the collective knowledge doctrine, by arguing that a company should be held liable for the offence committed by its agents even if no individual is proved to have the requisite mental state. Unlike the collective knowledge doctrine under which only individuals' innocent minds are utilised to formulate corporate knowledge, however, they attempt to capture corporate fault in terms of some features peculiar to corporations.[25] Pursuant to organisation theory,[26] they

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[25] See, for example, P.H. Bucy, "Corporate Ethos: A Standard for Imposing Corporate Criminal Liability" (1991) 75 *Minnesota Law Review* 1095 [hereinafter cited as *Ethos*]; H.L. Pitt & K.A. Groskaufmanis, "Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct" (1990) 78 *Georgetown Law Journal* 1559; A. Foerschler, "Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct" (1990) 78 *California Law Review* 1287; J. Gobert, "Corporate Criminality: Four Models of Fault" (1994) 14 *Legal Studies* 393; D. Hanna, "Corporate Criminal Liability" (1989) 31 *Criminal Law Quarterly* 452; C.M.V. Clarkson, "Corporate Culpability" (1998) 2 *Web Journal of Current Legal Issues*; A. Rose, "Developments in Criminal Law and Criminal Justice - 1995 Australian Criminal Code Act: Corporate Crimina Provisions" (1995) 6 *Criminal Law Forum* 129; Colvin, *Corporate Personality*, *supra* note 3; D. Stuart, "Punishing Corporate Criminals with Restraint" (1995) 6 *Criminal Law Forum* 219; J. Moore, "Corporate Culpability under the Federal Sentencing Guidelines" (1992) 34 *Arizona Law Review* 743.

[26] For a general understanding of organisation theory, see, for example, R.H. Hall, *Organizations - Structures, Processes, and Outcomes* (1996, 6th ed., Prentice-Hall International, Inc., New Jersey); T.E. Deal & A.A. Kennedy, *Corporate Cultures - The Rites and Rituals of Corporate Life* (1988, Penguin Books, New York); D. Graves, *Corporate Culture - Auditing and Changing the Culture of Organizations* (1986, Frances Printer (Publishers), London); L.B. Mohr, *Explaining Organizational Behavior* (1982, Jossey-Bass Publishers, San Francisco); M.B. Clinard & R. Quinney, *Criminal Behavior Systems - A Typology* (1973, 2nd ed., Holt, Rinehart and Winston, Inc., New York), Ch. 8; D. Vaughan, *Controlling Unlawful Organizational Behavior - Social Structure and Corporate Misconduct* (1983, The University of Chicago Press, Chicago) and "Toward Understanding Unlawful Organizational Behavior" (1982) 80 *Michigan Law Review* 1377; J. Martin & C. Siehl, "Organizational Culture and Counterculture: An Uneasy Symbiosis" (1983) 12 *Organizational Dynamics* 52; L.K. Trevino, "A Cultural Perspective on Changing and Developing Organizational Ethics" (1990) 4 *Research in Organizational Change and Development* 195 and "Ethical Decision Making in Organizations: A Person-Situation Interactionist Model" (1986) 11 *Academy of Management Review* 601; B. Victor & J.B. Cullen, "The Organizational Bases of Ethical Work Climates" (1988) 33 *Administrative Science Quarterly*

maintain that corporate actions are not simply reducible to the aggregate of each individual's conduct or the products of individual choice, so that the individual acts relating to the company's illegal activities should be considered within complicated organisational environments that involve distinct structures, processes of decision making and course of conduct, and cultures. Individual decisions and activities are shaped by corporate policy.[27] In his attempt to equate a human intentionality with corporate policy, Peter A. French has developed the sophisticated concept of corporate

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101; B.D. Baysinger, "Organization Theory and the Criminal Liability of Organizations" (1991) 71 *Boston University Law Review* 341; J. Child, "Organizational Structure, Environment and Performance - The Role of Strategic Choice" (1972) 6 *Sociology* 1; R.W. Scott, "Developments in Organization Theory, 1960-1980" (1981) 24 *American Behavioral Scientist* 407; B.M. Staw & E. Szwajkowski, "The Scarcity-Munificence Component of Organizational Environments and Commission of Illegal Acts" (1975) 20 *Administrative Science Quarterly* 345; J.W. Fredrickson, "The Strategic decision Process and Organizational Structure" (1986) 11 *Academy of management Review* 280; R.T. Pascale, "The Paradox of "Corporate Culture": Reconciling Ourselves to Socialization" (1985) 27 *California Management Review* 26; S. Ranson, B. Hinings & R. Greenwood, "The Structuring of Organizational Structures" (1980) 25 *Administrative Science Quarterly* 1.

[27] The term "corporate policy" seems popular among several commentators, such as Foerschler (*supra* note 25 at pp. 1306-1311), Gobert (*supra* note 25 at pp. 408-409), Hanna (*supra* note 25 at p.471) and Clarkson (*supra* note 25). On the other hand, some argue for the use of the term "corporate culture" (Rose, *supra* note 25 at p.135; Stuart, *supra* note 25 at pp. 250-254; Colvin, *supra* note 25 at 35), "corporate character" (Moore, *supra* note 25), "corporate codes of conduct" (Pitt & Groskaufmanis, *supra* note 25) or Greek rhetorical term "corporate ethos (*ήθος*)" (Bucy, *Ethos*, *supra* note 25). The following is what Bucy has to say on this semantic matter:

> "These latter terms [corporate culture and corporate personality] both have specialized meanings within their originating disciplines of anthropology and psychology, respectively, that may prove limiting. Also, in their popularity, both terms have become homogenized, losing much of their clarity."

Ibid. at 1121, n.98. Pitt and Groskaufmanis also note that:

> "In this article, we use the terms "corporate codes of conduct," "corporate codes," "and codes" synonymously. We define these terms to include any written statement of ethics, law, or policy (or some combination thereof), delineating the obligations of one or more classes of corporate employees."

Ibid. at 1559, n.1. The term "corporate culture" is defined in Part 2.5, Section 12.3 (6) of Criminal Code Act 1995 (Commonwealth of Australia, No. 12 of 1995 [hereinafter cited as Australian Criminal Code Act 1995]) as:

> "an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities take place."

It is obvious from these definitional explanations that "corporate policy" may be the vital or common component comprising "corporate codes of conduct" or "corporate culture," so that the term "corporate policy" has been chosen in this thesis to describe the contours of each commentator's theory. On the other hand, Moore has failed to define the term "corporate character", but his usage of this term indicates that he is in favour of the character theory, one of major theories concerning the issue of the requirement of culpability. This issue will be treated in the next chapter of this thesis.

policy.[28] According to French, corporations exhibit an intentionality, which cannot be reduced simply to the intentionality of its directors, employees or any other agents, through a Corporation's Internal Decision Structure (CID Structure).[29] CID Structures, which "every corporation has,"[30] consist of both the corporate responsibility flowchart that sketches stations and levels within the corporate power structure, and the corporate procedural and decision-making recognition rules that are usually embedded in corporate policy.[31] French continues:

> "The CID Structure is the personnel organization for the exercise of the corporation's power with respect to its ventures, and as such its primary function is to draw experience from various levels of the corporation into a decision-making and ratification process. When operative and properly activated, the CID Structure accomplishes a subordination and synthesis of the intentions and acts of various biological persons into a corporate decision.... [T]he CID Structure licenses the descriptive transformation of events, seen under another aspect as the acts of biological persons (those who occupy various stations on the organizational chart), to corporate acts by exposing the corporate character of those events. A CID Structure *incorporates* acts of biological persons."[32]
>
> "[W]hen the corporate act is consistent with an instantiation or an implementation of established corporate policy, then it is proper to describe it as have been done for corporate reasons, as having been caused by a corporate desire coupled with a corporate belief and so, in other words, as corporate intentional."[33]

Several attempts have been made to incorporate French's concept of corporate policy into the legal framework of corporate fault. Bucy, for example, maintains that a company should be held liable when the personality, or what she calls "ethos", of the organisation encourages corporate agents to commit the particular criminal conduct.[34] Such an ethos may be identified by resorting to circumstantial evidence, including the inquiry into corporate hierarchy, goals, efforts to ensure the employees' compliance with legal requirements and to investigate the current offence, reactions to past violations and

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28 P.A. French, *Collective and Corporate Responsibility* (1984, Columbia University Press, New York).

29 French, *ibid.* at pp. 39-46.

30 *Ibid.* at p. 41.

31 *Ibid.*

32 *Ibid.* at pp. 41-42.

33 *Ibid.* at p. 44.

34 Bucy, *Ethos*, *supra* note 25 at pp. 1127-28.

violators, and presence or absence of compensation incentives for legally appropriate behavior and the indemnification of employees.[35]

Moore also argues, in his corporate character theory, that one of the following three circumstances must be present to find corporate fault: (1) the corporation has adopted a policy that is illegal, and an agent of the corporation carries out that policy; (2) an illegal act is committed, authorised, ordered or endorsed by a high managerial official in the corporation; or (3) the corporation implicitly ratifies or endorses the violative act by its employee.[36]

A similar legal framework has been suggested by Foerschler to determine corporate fault. According to her, the corporate fault may be found in the corporate policy or practice when its agent's illegal conduct is accompanied by one of the following three criteria: (1) a corporate practice or policy violates the law; (2) it was reasonably foreseeable that the corporate practice or policy would result in a corporate agent's violation of the law; or (3) a corporation adopts a corporate agent's violation of the law.[37]

4.1.3. Proactive Fault

The third model is the proactive corporate fault model in which French's corporate

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35 *Ibid.* at pp. 1127-1146. See also P.H. Bucy, "Organizational Sentencing Guidelines: The Cart before the Horse" (1993) 71 *Washington University Law Quarterly* 329.

36 Moore, *supra* note 25 at pp. 768-769. The term "a high managerial officer" (or agent) is originally used in the American Model Penal Code, §2.07(1)(c), providing that:

> "(1) A corporation may be convicted of the commission of an offence if:
>
> (c) the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment."

The term is defined in §2.07(4)(c) as:

> "an officer... or any other agent of a corporation.... having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation...."

The American Law Institute, *Model Penal Code - Official Draft and Explanatory Notes* (1985, Philadelphia).

37 Foershcler, *supra* note 25 at pp. 1306-1311. The facts of Commonwealth v. McIlwain School Bus Lines ((1980) 423 A.2d 413, cited in Chapter 3, text accompanying notes 116-118) and US v. T.I.M.E.-D.C., Inc. ((1974) 381 F.Supp.730, cited in text accompanying notes 9-14) are used by Foerschler as supportive examples for the first and second criteria respectively.

policy model is reflected. Unlike the corporate policy model which directly equates a human intentionality with corporate policy in relation to the conduct of agents, the proactive corporate model pays attention to corporate fault prior to their conduct. That is, the proactive corporate fault model finds corporate liability where a corporation, as an organisation, fails to exercise due diligence to prevent the crime committed by its employee.[38] A corporation is held liable when it fails to prove by a preponderance of the evidence that any precautious and preventive steps had been taken by its top or decision-making officials at the time of the commission of the employee's crime. The types of precautions involve stringent policies and practices both of which had clearly and convincingly forbidden the illegal conduct by any employees, and which had developed and implemented reasonable safeguards designed to prevent corporate crime, such as regular procedures for evaluation and detection. In order for the company to satisfy the requirement of reasonable efforts to prevent the crime, senior officials and top management would be required to ensure on a regular basis that the precautions adopted are sufficiently adequate to prevent violations through internal assessments (evaluation) as well as through outside audits and regular compliance reports that bring potential or ongoing violations to their attention (detection).[39]

The core of this model lies in the fact that the exercise of due diligence by senior

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[38] This model was proposed in Anonymous, *Developments in the Law*, *supra* note 5 at pp. 1257-1258. On closer examination, however, the difference between the proactive corporate fault model and the vicarious liability doctrine (coupled with the availability of a due diligence defence) becomes of little significance. Hence, the following commentators should be seen as the advocates of this model: Anonymous, "Criminal Liability of Corporations for Acts of Their Agents" (1946) 60 *Harvard Law Review* 283; J.V. Dolan & R.S. Rebeck, "Corporate Criminal Liability for Acts in Violation of Company Policy" (1962) 50 *Georgetown Law Journal* 547; R. Hamilton, "Corporate Criminal Liability in Texas" (1968) 47 *Texas Law Review* 60; B. Coleman, "Is Corporate Criminal Liability Really Necessary?" (1975) 29 *Southwestern Law Journal* 908; G.R. Sullivan, "The Attribution of Culpability to Limited Companies" (1996) 55 *Cambridge Law Journal* 515 [hereinafter cited as *The Attribution*] and "Expressing Corporate Guilt" (1995) 15 *Oxford Journal of legal Studies* 281.

Two points should be borne in mind. Sullivan argues against the existence of corporate culpability which transcends the aggregate of individual culpability or which is disassociated with the acts and mental states of at least one individual. In addition, the author(s) of *Developments in the Law* ultimately proposed, in the article, to replace criminal sanctions against corporations with civil sanctions such as civil fines, and pursued the criminal liability of top corporate officials. *Ibid.* at 1369-1375. This view is shared with E. Lederman, "Criminal Law, Perpetrator and Corporations: Rethinking a Complex Triangle" (1985) 76 *Journal of Criminal Law & Criminology* 285.

[39] *Developments in the Law*, *supra* note 5 at 1258.

officers is proactive, and it is an affirmative defence, not an element of the crime, so that the defendant company is required to prove the presence of the exercise by a preponderance of the evidence.[40] Considering the combination of a due diligence defence with the vicarious liability doctrine, what Sullivan calls "a long familiar principle,"[41] the proactive corporate fault model may not be a novel idea. It is to be noted, however, that this model places more emphasis upon the reasonableness of corporate policies, practices and procedures than the vicarious liability doctrine does.[42]

4.1.4. Reactive Fault

Both corporate policy and proactive corporate fault models use some distinctive features of corporations, such as corporate policy, practices or procedures, as proof of corporate fault for causally relevant conduct of the corporate agent(s) at or before the time the wrongdoing is under way. On the other hand, the reactive corporate fault model, which has been proposed by Fisse and Braithwaite,[43] finds such traditional timeframes difficult to accept in order to capture corporate *mens rea*, and shifts its focus of corporate liability from fault prior at the time of the commission of the *actus reus* of the offence, to fault based on the performance of the corporate defendant in reaction to the occurrence of the *actus reus* of the offence.[44] The concept of reactive corporate fault is defined by Fisse

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40 *Ibid.* at 1257, n.71.

41 Sullivan, *The Attribution*, *supra* note 38 at 543. For further details of a due diligence defence particularly in the context of corporate vicarious liability, see, for example, Gruner, *supra* note 3, ch.6.

42 *Developments in the Law*, *supra* note 5 at 1258.

43 See, for example, B. Fisse, "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions" (1983) 56 *Southern California Law Review* 1141 [hereinafter cited as *Reconstructing*]; *A Statutory Model*, *supra* note 24; "Sentencing Options against Corporations" (1990) 1 *Criminal Law Forum* 211; "Recent Developments in Corporate Criminal Law and Corporate Liability to Monetary Penalties" (1990) 13 *University of New South Wales Law Journal* 1; and *Howard's Criminal Law* (1990, 5th ed., Law Book Co., Sydney) [hereinafter cited as *Howard*], ch.7; B. Fisse & J. Braithwaite, "The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability" (1988) 11 *Sydney Law Review* 468; "Corporate Offences: The Kepone Affair" in R. Weston (ed.), *Combating Commercial Crime* (1987, Law Book Co., Sydney), pp. 31; and *Corporations, Crime and Accountability* (1993, Cambridge University Press) [hereinafter cited as *Corporations*].

44 Fisse and Braithwaite, *Corporations*, *supra* note 43 at p. 47. They argue that it is rare to find a company displaying an express criminal policy that endorses or encourages criminal behaviour at or before the time of commission of the *actus reus* of the offence. *Ibid.* at p. 48. See also Fisse,

and Braithwaite as "unreasonable corporate failure to devise and undertake satisfactory preventive and corrective measures in response to the commission of the *actus reus* of an offence by personnel acting on behalf of the organisation."[45]

Under this model, the corporate fault regarding the commission of the *actus reus* of the offence by its agent(s) may be found in one or other of the following ways: (1) by having a policy that expressly or impliedly authorises or permits the commission of the offence or an offence of the same type; (2) by failing to take reasonable precautions or to exercise due precautions to prevent the commission of the offence or an offence of the same type; (3) by having a policy of failing to comply with a reactive duty to take preventive measures in response to having committed the external elements of the offence; or (4) by failing to take reasonable precautions or to exercise due diligence to comply with a reactive duty to take preventive measures in response to having committed the external elements of the offence.[46] The presence or absence of corporate reactive programs was, according to Fisse, originally considered merely a factor relevant to mitigation or aggravation of the sentence.[47] Later, it has been incorporated into the basis of corporate criminal liability under the reactive corporate fault model.

4.2. Case Studies

Each model of corporate fault described in the previous section has a common feature:

Reconstructing, *supra* note 43 at pp. 1191-1192.

45 Fisse and Braithwaite, *Corporations*, *supra* note 43 at 48. The reactive programs of a corporation following commission of the *actus reus* of the offence at issue are comprised of: (1) initiation and completion of an effective program of internal disciplinary action; (2) modification of compliance policies or standard operating procedures which, if left in place, would be likely to occasion further violations; (3) redress by means of compensation, restitution, or rectification; and (4) facilitation of the redress of corporate harmdoing by providing public notice of likely rights of action, impact-assessment studies, and other means of remedial assistance. Fisse, *Reconstructing*, *supra* note 43 at 1205.

46 Fisse, *Howard*, *supra* note 43 at p. 605.

47 Fisse, *Reconstructing*, *supra* note 43 at pp. 1195-1197. See, for example, US v. Olin Corporation (1978, D. Conn, 1 June) Criminal No. 78-30, slip op., cited in *ibid.* (in which a leading firearms manufacturer pleaded no contest to a charge of conspiring to ship about 3,200 rifles to South Africa in violation of a trade embargo. The maximum fine was $510,000, but the court ordered a fine of only $45,000 because of the company's reactive performance.) For the facts of this case, see R.E. Tomasson, "Olin's Arms Penalty: 'Donation' Plus Fine" *New York Times*, 2 June 1978, at D1, col.4.

namely, their "effort to move beyond simple imputation of intention and action"[48] of the particular individual to a corporation. As a result, the corporation may be held liable for its own fault concerning commission of the offence by agents, irrespective of whether or not individual's fault is identified. This common feature, however, also shows that there is little difference as to the content and the scope of application of each model which this subsection examines in relation to corporate manslaughter cases.

Several cases of corporate manslaughter may provide a strong basis for the proactive corporate fault model.[49] The following factors in these cases may be in favour of this model: the company's failure to establish an adequate system of maintenance for its plant and vehicle;[50] to supervise the construction of a cofferdam;[51] to provide a safe

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48 Laufer, *supra* note 1 at 668. However, emphasis needs to be on "simple" imputation in this sentence, which means each model does not adhere to a conviction of the particular individual to hold a company liable for his/her offence. As described later, the state of mind and action of individuals are, if not culpable, still considered in each model.

49 Most cases of corporate manslaughter which will be used here to demostrate the applicability of each model of corporate fault are derived from the previous chapter. However, three cases, namely, Cory Brothers Ltd. ([1927] 1 K.B. 810, cited in Chapter 3, text accompanying notes 14 -16), British Steel Plc. ([1995] ICR 586, cited in Chapter 3, text accompanying notes 100-101) and State v. Pacific Powder Co. ((1961) 360 P.2d.530, cited in Chapter 3, text accompanying note 110) leave no room for the application of four models. At first, in the Cory case, some controlling officers' decision to put up the electric fence is well identified with the defendant company's reckless mental states constituting the ingredients of manslaughter, so that there is no doubt that the identification principle can be applied.

In addition, in the British Steel case, the prosecution acknowledged that the company's delegation system of responsibility for supervision to the experienced section engineer was perfectly acceptable and, therefore, it is difficult to detect any fault of the company in relation to his failure to supervise the repositioning operation at issue. It seems to be only the vicarious liability doctrine that may justify the company's liability in such situations.

Finally, in the Pacific Powder case, one possible fault on the part of the defendant company was its failure to instruct the truck driver not to leave the truck unattended. As pointed out in the previous chapter (text accompanying note 110), the immediate cause of the fire that occurred at the wooden building was neither proved by the prosecution nor foreseeable to the driver or the company itself. In this case, too, only the vicarious liability doctrine may justify the defendant company's liability.

50 The Queen v. Denbo Pty. Ltd. (unreported, 14 June 1994, Supreme Court of Victoria, Teague J., cited in Chapter 3, text accompanying note 22); Commonwealth v. McIlwain School Bus Lines, Inc. (1980) 423 A.2d.413, cited in Chapter 3, text accompanying notes 116-118; Commonwealth v. Fortner LP Gas Co. (1980) 610 S.W.2d.941, cited in Chapter 3, text accompanying note 119.

51 People v. Ebasco Services Inc. (1974) 354 N.Y.S.2d.807, cited in Chapter 3, text accompanying note 23.

workplace;[52] to allow the chief engineer sufficient time to familiarise himself with the ship before it sailed;[53] to let the experienced foreman take charge of the demolition of bridges;[54] and to supply safe and efficient equipment and life preservers for the steam boat's passengers and to train the crew to ensure that they were aware of their duty to rescue passengers on fire occasions.[55]

In the context of corporate manslaughter, as these factors indicate, the proactive corporate fault model may find the corporate fault when it is reasonably assumed that a company's failure to take preventive steps causes the victim's death. Preventive steps are, of course, to be taken against the source of risk inherent in the particular operations of the company's business, such as building and construction, mining, extraction, air, sea and rail transportation and production.[56] As analysed in the previous chapter,[57] the corporate proactive fault may consist of: (1) failures properly to train employees who are the closest position to the source of risk so as to prevent them from causing the source of risk to materialise; and (2) failures to organise a safety system either to control the source of risk directly or to prevent the employees' mistakes in relation to the source of risk from causing the prohibited consequences.

The relationship between these two types of proactive faults is, on one occasion, exclusive, and on the other occasions, interactive or supplementary. In such cases as the Denbo, MacIlwain School Bus and Fortner LP Gas, the company's failure directly to control the source of risk caused the victims' deaths, so that it would be irrelevant

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52 People v. Chicago Magnet Wire Co. (1987) 510 N.E.2d.1173; (1989) 534 N.E.2d.962, cited in Chapter 3, text accompanying note 31.

53 Seaboard Offshore Ltd. v. Secretary of State for Transport [1994] 1 WLR 541; 2 All ER 99, cited in Chapter 3, text accompanying notes 32-33.

54 Northern Stripping Mining Construction Ltd., *The Times*, 2, 4 and 5 February 1965,cited in Chapter 3, text accompanying note 41. See also US v. Dye Construction Co. (1975) 510 F.2d.78, cited in Chapter 3, text accompanying notes 96-97 (in which the decision as to whether the trench at issue was to be shored was delegated by the construction company to the back hoe operator, whose wrong decision led to the cave-in, claiming the assistant pipe layer's life.)

55 US v. Van Schaik (1904) 134 F.592, cited in Chapter 3, text accompanying notes 92-93.

56 Sullivan, *The Attribution*, *supra* note 38 at 527.

57 Chapter 3, text accompanying note 24.

whether the company properly trained the employees who were engaged in the particular operation that involved the source of risk, in order to prevent their mistakes from causing the consequences. Similarly, in cases of Seaboard Offshore, Northern Stripping Mining and Dye Construction, the employee who was in the nearest position to the source of risk immediately triggered the consequences and, thus, the company had no chance to prevent the mistake made by the employee from causing the consequences.

On the other hand, the Van Schaik case illustrates an example of a mixture of two corporate proactive faults: failures properly to train the crew and to provide safe equipments to rescue the victims. Although the source of risk, a fire, was not caused by any employees of the company in this case, it is reasonable to assume that an accidental fire could occur anywhere. Thus, the company's fault was not its failure to prevent the fire from occurring, but its failure to prevent the occurrence of the fire from causing the victims' deaths.[58] If the crew had either been properly trained or the safety equipment had been provided by the company to rescue passengers, the consequences could have been avoided.

It is interesting to assume that in these examples, the company's failure to take preventive measures had lasted for a certain period prior to the incident. In these circumstances, it would be possible that such sloppy practices were embedded and routinised in the corporate business. If so, the factors comprising corporate proactive fault can also be considered to constitute the basis for the corporate policy model. Suppose that in the Van Schaik case, the steam boat company had allowed the boat to navigate neither with the safety equipment provided nor with the crew properly trained several times prior to the incident.[59] Or, the inexperienced workers had frequently been assigned by the company to the particular operation involving the source of risk in cases

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58 Chapter 3, n.55.

59 The same may be true of the McIlwain School Bus and Fortner LP Gas cases. As mentioned in *supra* note 37, Foerschler, one of the advocates of the corporate policy model, uses the McIlwain School Bus case as an example for her second prong provided in *supra* text accompanying note 37, stating that:

> "Assuming that the failure to install mirrors was a policy decision or a standard operating procedure, the corporation could properly be considered to have had the intent to violate the vehicle code."

Foerschler, *supra* note 25 at 1307.

of the Seaboard Offshore, Northern Stripping and Dye Construction. If this additional factor, namely, "pattern of wrongdoing,"[60] is found, both the proactive corporate fault and corporate policy models may share the same scope of corporate liability.

The distinction between the scope of the application of the corporate proactive fault model and that of the corporate policy model becomes more blurred if it is successfully proved that one of the controlling officers or high managerial officials is involved in the illegal act. That is, under Moore's second prong, a company may be held liable for such senior management's participation in criminal conduct.[61] The importance of the involvement of senior management in criminal activities is described by Moore as follows:

> "Delegation of authority to [high managerial] officials is one of the primary ways in which organizations direct and control the behavior of their agents. Some officials are so closely identified with the organization that their participation in or toleration of criminal activities sends a message that such activities are consistent with corporate policy.... [T]he behavior of high managerial officials is perhaps the most important factor in determining the likelihood that a corporation will engage in crime." [Footnotes omitted][62]

The involvement of the senior management in the company's fault in relation to the source of risk was proved in cases of the Denbo (the owner), Ebasco (the executive vice president and several supervisors), Chicago Magnet (five corporate officials), Van Schaik (the captain, managing director, secretary and treasurer), People v. O'Neil[63] (the president, plant manager and two plant foremen), Kite, Stoddart & OLL Ltd.[64] (the managing director), Commonwealth v. Welansky[65] (the owner of the night club) and

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60 Clarkson, *supra* note 25.

61 *Supra* text accompanying note 36.

62 Moore, *supra* note 25 at 766 and 769. See also the definition of the term "a high managerial agent" by the Model Penal Code provided in *supra* note 36, in particular, "represent the policy of the corporation."

63 (1990) 550 N.E.2d.1090, Chapter 3, text accompanying notes 60-67.

64 Unreported, *The Times* and *The Independent*, 9 December 1994, cited in Chapter 3, text accompanying notes 25-29.

65 (1944) 55 N.E.2d.902, cited in Chapter 3, text accompanying notes 47-50.

State v. Serebin[66] (the nursing home administrator).

Notably, the defendant corporations in the last three cases were virtually "one-man" companies owned and controlled by the individual defendants. It is probable that in such situations, the decision by senior management simply reflects the company's policy so that the successful identification of the controlling officer's fault automatically leads to a finding of corporate policy. If the senior management fails or decides not to take preventive steps, and their failure lasts for a certain period prior to the occurrence of the victim's death, such sloppy corporate practices may inevitably comprise both the basis for the proactive corporate fault and that for the corporate policy model.

As far as the reactive corporate fault is concerned, a typical example to support this model may be the Warner-Lambert case.[67] The important facts comprising reactive corporate fault were that the company was once informed of the illegal situations which would potentially lead to the prohibited consequences, but its subsequent remedial or corrective actions were so unsatisfactory that the company's insufficient response let the previous situations cause the consequences. In the Warner-Lambert case, the defendant company was notified by the insurance carrier of the existence of the hazardous dust condition in the chewing gum production area, but its executive decision to modify the dangerous condition was not fully executed. Although the prosecution failed to detail the actual triggering cause of the subsequent explosion that occurred at its plant, it was clear that the explosion could be avoided if the company completed its modification regarding the dust condition and its manufacturing plan.

On closer analysis, it is found that the following three conditions should be met in applying the reactive corporate fault model to corporate liability for manslaughter: (1) a company, in particular, the senior management involved in the corporate decision-making processes, was informed of illegal conduct by employees or potentially life-endangering situations inherent in the particular operation which occurred in the past or existed at the time of notification; (2) at the time of notification, such illegal conduct or

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66 (1983) 338 N.W.2d.855 and (1984) 350 N.W.2d.65, cited in Chapter 3, text accompanying notes 43-44.

67 (1980) 414 N.E.2d.660, cited in Chapter 3, text accompanying notes 57-58.

dangerous situations had not caused any casualty yet, but it would be reasonably foreseeable or would be probable that they would lead to the prohibited consequences in the future; and (3) the company's failure to respond to or failure satisfactorily to eliminate the previous unjustified harm-causing or risk-taking conditions has a causal link with the consequences. Fisse exemplifies the meaning of "notification" by an injunctive order issued by a court and orders or notices issued administratively by an enforcement agency.[68]

However, a reason for the adoption of the idea of notification under the reactive corporate fault model, which has been given by Fisse, is puzzling. Fisse argues that:

> "Although strategic *mens rea* [express or implied policies by a corporation] is a genuinely corporate concept of mental state, requiring the prosecution to establish a criminal corporate policy at or before the time that the *actus reus* of an offense is committed would make corporate *mens rea* extremely difficult to prove. Corporations almost never endorse criminal behavior by express policy, and boilerplate anticrime policy directives may make it very difficult to establish the existence of implied criminal policies. The difficulty of proving strategic *mens rea*, however, may be significantly reduced if the requisite *mens rea* based on corporate policy need not be shown to have existed at or before the time of the *actus reus* of the offense. If the corporate defendant is given a reasonable opportunity to formulate a legal compliance policy after the *actus reus* of the offense is brought to the attention of the policymaking officials, the corporation's fault can be assessed on the basis of its present reactions rather than its previously designed formal policy directives."[69] [Footnotes omitted]

It could be assumed from this extract that while Fisse generally agrees that a corporation should be held liable for its criminal policies under the corporate policy model, the reactive corporate fault model is preferable in most cases where it is difficult to prove "a criminal corporate policy at or before the time that the *actus reus* of an offense is committed." If so, the reactive corporate fault may offer no advantage over the corporate policy model when it is somehow proved that "the policymaking officials" of the corporation were informed by their employees (not by the issue of a court order) of the hazardous conditions or the commission of the *actus reus* of the offence. And if it is proved that the "policymaking officials" or senior management either decide to ignore or do not take their employees' advice seriously, their failure to take satisfactory

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[68] See, for example, Fisse, *Reconstructing*, *supra* note 43 at 1205; *A Statutory Model*, *supra* note 24 at pp. 294-296.

[69] Fisse, *Reconstructing*, *supra* note 43 at pp. 1191-1192.

remedial measures may constitute the basis for the reactive corporate fault. Nevertheless, because the senior management is also involved in the corporate decision-making processes, it is possible that their ignorance of notices from inferiors reflects corporate policy with which the subsequent behaviour of corporate employees are consistent. In these circumstances, the application problem may also arise between the reactive corporate fault and corporate policy models.

The puzzling concept of notification also causes another application problem between the reactive and proactive corporate fault models. As explained earlier, it is necessary for the reactive corporate fault model in the corporate manslaughter case that the previous illegal conditions had not caused the prohibited consequences prior to the occurrence of the victim's death. The meaning of term "reactive" may lose its significance because it is also possible that the senior management's ignorance of notices from their inferiors can be interpreted as their decision to continue their failure to take preventive steps. The term "proactive" or "preventive" means prior to the occurrence of the victim's death or the materialisation of the source of risk. If such an interpretation is permissible, the decision by the senior management, namely, the company's decision, to continue their failure to take preventive steps against the source of risk can simply be considered to comprise the company's proactive fault.[70]

In short, organisation theories, consisting of the corporate policy, proactive and reactive corporate fault models, have practical problems concerning the scope of their application. The possible solution to this problem is to allow the court to consider several factors in favour of each model to comprise a hybrid form of corporate fault. Consider the following four cases of corporate manslaughter to analyse the idea of a

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[70] Two application problems between the reactive corporate fault model and the proactive corporate fault model and between the reactive corporate fault model and the corporate policy model become more evident from the following remark by Fisse. In rebutting the argument that a concept of reactive corporate fault would result in excessive leniency toward corporations because this model fails to capture corporate fault without the issue of court order or any notification, Fisse replies that "this Article does not advocates reactive corporate fault as an exclusive basis of establishing *mens rea*: strategic *mens* rea [corporate policies] or lack of corporate due diligence [proactive corporate fault] at or before the time of *actus reus* of an offense would also be a sufficient *mens rea*." Fisse, *Reconstructing*, *supra* note 43 at pp. 1209-1210.

In contrast, the concept of notification will also be adopted under the proposed approach submitted in Chapter 5, in order to make it easy to distinguish between corporate recklessness and corporate gross carelessness in cases of corporate manslaughter. See Chapter 5, n.93.

hybrid form of corporate fault.

The first is the Kite & OLL case in which the defendant company's canoe trip operation was organised by its managing director. Since the identification principle was applied to this case, his fault consisted of failures to train instructors and to provide safety equipment was viewed as the company's fault (proactive fault). Under Moore's second prong, his proactive fault can be construed as the manifestation of corporate policy with which behaviour of his instructors were consonant (corporate policy). Furthermore, nine months before the disaster, he received a warning letter from ex-instructors about safety management of canoe trips which he did not take seriously.[71] His failure to heed the warning may be equivalent to unsatisfactory reactions to the risks he was running at that time (reactive fault).

The second case is Serebin, in which a central issue was whether a nursing home administrator could be guilty of reckless conduct for the death of the victim who walked out of the nursing home and died of exposure. In this case, too, he was responsible for the day-to-day operation of nursing home. His policy decision to admit more patients and to reduce the nursing staff further made it impossible for the rest of nurses and aides to supervise patients, particularly those who had a tendency to wander around (corporate policy). As for the preventive measures againt the victim's death, he failed both to install an alarm at the doors through which the victim left, and to give the staff instructions concerning proper checking so as to make sure that patients were on beds (proactive fault). Moreover, prior to the incident, he had been repeatedly warned by his own staff and state officials that the insufficient staffing would make it impossible to watch wandering residents. He also knew that the victim had walked away from the nursing home on prior occasions by 24-hour reports from his staff. Nevertheless, he took no action (reactive fault).

The third is the O'Neil case, in which the president, plant mamager and two foremen of the silver-extracting company were charged with murder of the victim. Their failure to inform the victim that he was working with cyanide and to supply him

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[71] Chapter 3, n.29.

with appropriate safety equipment may provide the basis for the corporate proactive fault. As in the two cases exemplified above, there may be room for considering corporate policy to be reflected in their proactive fault if their failures had remained unchanged for a certain period and had been embedded in corporate practices prior to the victim's death. In addition, it was proved in this case that they were informed of the leathal conditions of the plant by one who supplied the company with first aid kits and visited the plant four months before the victim's death. Nevertheless, they did not take remedial actions.[72]

The final case is P & O, in which a ferry capsized because the bow doors were open while the vessel was out at sea. The crew of the ferry were not properly trained, in that they were not fully aware of their duty in relation to the bow doors. A month before the capsize, although directors of the company knew previous open-door incidents, they did not seriously consider the ship masters' recommendation of the installation of warning lights in order for the ferry's captain to ensure that doors were closed. Added to these proactive and reactive faults, the company was criticised at the official inquiry for being infected with the desease of sloppiness concerning its management.[73] If such sloppy management was prevalent in corporate practices, it would be easy to find culpable corporate policy in this case.[74]

It follows from these examples that the application of one model of corporate fault does not exclude the others. On the contrary, some factors that seem critical for the application of one model can be shared with the application of other models. This application issue leads to the conclusion that each model does not have any strong reason to exist as an independent theory to capture corporate fault. As indicated through case studies in the previous chapter, the most important fact to be considered in the context of corporate liability for manslaughter is whether the victim's death could

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72 Chapter 3, n.63.

73 Chapter 3, n.77.

74 If the aggregation theory had been applied to this case, it would have provided corporate reckless mental states by aggregating several corporate agents' knowledge. See Chapter 3, text accompanying notes 88-90.

readily be avoided by the company. From this point of view, the company's proactive fault, reactive fault or illegal policy which encouraged its agents to engage in criminal conduct, are merely factors to constitute genuine corporate fault that invokes criminal responsibility. To construct genuine corporate fault as one of the elements of manslaughter, it is necessary to synthesise and coordinate these models.[75]

4.3. Operational and Conceptual Flaws of Corporate Fault Models

The previous section, through case studies, illustrated the problematic aspect of each model in relation to its application, and also provided a temporary solution, namely, a hybrid corporate fault. Before advancing this idea, it may be desiable to examine criticisms that have been made by commentators against each model. Their criticisms are concerned with each model's operational and conceptual flaws. At first, focus is placed upon outlining their criticism in relation to operational flaws which each model suffers.

To begin with, the aggregation theory and collective knowledge doctrine have been criticised by commentators for their deterrent effects on corporate crime. The aggregation theory cumulatively utilises individual pieces of knowledge possessed by persons who have no intention to engage in illegal conduct. If A and B, corporate employees, are in different departments and have no occasion to communicate on certain matters, "it is too impractical to require corporate superiors to become aware of each and every piece of information pertaining to corporate affairs."[76] As a result, companies are given no advance opportunity to know what they are required to do to escape liability.[77] This theory's failure to indicate how corporations can avoid liability may cause the

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75 At this stage, the concept "genuine" corporate fault, which will be constructed through coordination and synthesis of each model in the next chapter, is temporarily called "hybrid corporate fault."

76 Rogozino, *supra* note 3 at 467.

77 Rogozino, *ibid.* See also Colvin, *supra* note 3 at 22; Clarkson, *supra* note 25, concluding that "In short, it is a type of constructive liability, now out of fashion in English law."

unnecessary limitation of deterrent effects.[78]

Next, a due diligence defence approach, adopted in the proactive corporate fault model, is criticised from a practical point of view. The criticism against this approach is based on the gap between the extent to which the company can establish a due diligence defence to escape liability and that to which the company can actually prevent the offence. This gap has been accurately stated by Coffee as follows:

> "On a more theoretical level, once such a [due diligence] defense is recognized, the corporation might invest less funds in monitoring and detecting illegal and potentially illegal behavior since, once the minimal standard of diligence is met, the corporation becomes legally immune and has no remaining incentive to prevent criminal acts by its agents, even though further investment might prevent such crime. In theory, the ideal position for the corporation would be to invest just enough to establish the defense but not to prevent those crimes profitable to the corporation. Yet without the defense, the rational corporation would invest in crime prevention by any means (including research or experimentation with new techniques) up to the level at which such expenditures equaled the expected penalty - that is, the likely fine discounted by the likelihood of apprehension and conviction. In short, the absence of the defense creates an incentive to seek new methods of prevention not yet established or required by a due-diligence standard. Ironically, the more diligence is made a defense, the less it is encouraged."[79]

Based on this observation, Coffee suggests that account should be taken of any corporate due diligence efforts at sentencing, rather than as an affirmative defence. This would result in a corporation's incentive to detect guilty individuals so as to reduce its own penalty, "whereas otherwise there might exist a desire to avoid such an inquiry for fear of detecting still-undiscovered violations."[80]

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78 Tigar, *supra* note 3 at pp. 224-225. Rogozino proposes the "duty stratification" approach, which may be applied in cases where a lower-level employee plays the active role in the offence but does not retain the requisite *mens rea*. The core of this approach is to impose a legal duty on corporate superiors responsible for the acts of subordinates (= the prospective actors of the offence) to make sure that employees are aware of their obligation of law-compliance and relevant statutes.

Because the new approach that will be advanced as a possible solution to the issue of corporate manslaughter in the next chapter overlaps some aspects of this approach, its detailed discussion will be present therein.

79 Coffee, *supra* note 5 at 262.

80 *Ibid.* Coffee submits three reasons for replacing corporate due diligence as an affirmative defence with a sentencing consideration: (1) it ensures that violation by an agent will result in a corporate conviction, thereby authorising the court to order restitution to victims and to consider interventionist strategies that might be implemented through a sentence of corporate probation; (2) the conviction would have a res judicata effect on civil litigation brought by injured victims of the crime, which in turn increases the corporate incentive to monitor; and (3) the court would gain a wider angle of vision in determining the adequacy of corporate monitoring efforts since it could consider developments subsequent to the offence that would be legally irrelevant at trial.

Furthermore, the reactive corporate fault model has been criticised for uncertainty of its terminology, in particular, as to what corrective steps would suffice for a corporation to avoid liability and what offence it would be charged with.[81] This model would work when corporate decision-making officials are informed of the commission of the *actus reus* of an offence by a lower-level employee and fail to take satisfactory remedial measures against it. One commentator observes that typical corrective measures likely to be taken by them are, in most cases, merely circulating a corporate memorandum outlining relevant statutory obligations so as to make sure that any employees are aware of their legal duties and, thus, that it would be unduly easy for companies to escape liability at trial.[82]

As for the applicability of the offence, it has been argued that in cases of manslaughter, for example, the prerequisites such as *actus reus* and *mens rea* are well-established, so that it would be a "false labelling" to hold a company liable merely for its failure to discipline an employee or to correct the illegal condition created by the company.[83] In other words, a danger of "false labelling" may arise because a finding of culpability from conduct and mental states which occur after the commission of the *actus reus* is "a radical departure from the norm" that requires findings of culpability in relation to, not in reaction to, the offence which is charged.[84]

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81 See, for example, Rogozino, *supra* note 3 at pp. 445-446; Sullivan, *supra* note 38 at pp. 525-527; Clarkson, *supra* note 25.

82 Rogozino, *supra* note 3 at 446, based on the analysis of the Bank of New England case (*supra* text accompanying notes 15-22). As discussed earlier, this would not be the case in Warner-Lambert, in which remedial actions taken by several corporate officials at issue were to reduce the dangerous dust condition in the chewing gum production area, if not satisfactorily, after the insurance carrier inspected the company's plant. Any lower- or middle-level employees were not involved in nor contributed to such conditions.

83 See, for example, Clarkson, *supra* note 25, referring to Sullivan, *The Attribution*, *supra* note 38 at 526 and the case of P & O (cited in Chapter 3, text accompanying notes 72-82).

84 Sullivan, *The Attribution*, *supra* note 38 at 525. The Law Commission, too, rejects the reactive corporate fault model for the following similar reason:

> "We went on to conclude, however, that the present project.... was not the appropriate occasion to consider a reform which would affect the whole of the criminal law; and that it was unnecessary to proceed that far in order to put corporate liability for *manslaughter* on a proper basis." [Footnote omitted]

Law Commission, *supra* note 1 at para. 7.35.

Finally, criticism has been made against the corporate policy model for its attempt to equate corporate policy with a human intentionality.[85] The major flaw of the corporate policy model is concerned with French's concept of a CID structure which blurs a clear line between goals *for* an organisation and those *of* an organisation.[86] Whilst goals *for* an organisation are, according to Keeley, preferences of people for organisational outcomes (*i.e.*, a state of affairs brought about through organisational behaviour), the goals *of* an organisation are outcomes intended by the organisation itself.[87] A close look at organisational rules or procedures comprising a CID structure,[88] as reflected in organisational charts, job descriptions, manufacturing specifications, commonly respected customs, and the like, may serve to identify organisational behaviour (individual joint behaviour), but does not ordinarily establish the organisational *intent* of that behaviour.[89]

To establish the organisational intent of organisational behaviour, it is necessary

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85 M. Keeley, "Organizations as Non-Persons" (1981) 15 *Journal of Value Inquiry* 149.

86 Keeley, *ibid.* at pp. 150-153. Keeley refers to P.A. French, "The Corporation as a Moral Person" (1979) 16 *American Philosophical Quarterly* 207.

87 Keeley, *supra* note 85 at 150. Keeley also uses the concept of consequences *of* an organisation which means any outcomes of joint behaviour. *Ibid.*

88 Cited in *supra* text accompanying notes 29-33.

89 An excellent example is presented by Keeley to describe such concepts as organisational behaviour, the organisational intent of organisational behaviour (goals *of* an organisation), organisational procedures, goals *for* an organisation and consequences *of* an organisation as follows:

> "Consider the game analogy.... If we know the rules of play (i.e., organizational procedures), we can often specify which actions count in the game (i.e., organizational behavior). And usually we can infer from these rules how various participants intend the game to turn out (i.e., goals *for* an organization). But rules of the game do not reveal what the game *itself intends*. In fact, it makes little sense to say that the game itself intends anything. The illogic of inferring organizational intentions from game-like properties is revealed in...[the] suggestion that the goal of an organization is inherent in its activities, much the same way as the goal of checkmating the king is inherent in the rules of chess. The analogy does not appear to support.... French's point that organizations have goals of their own. The goal of checkmating in chess is certainly not something *the game* tries or intends to accomplish. Nor is it a shared goal that the participants work together to achieve. Rather, checkmating the black king is a goal for one participant, checkmating the white king the goal of another, and both work toward their separate purposes within the context of mutually agreeable rules. So too in organizations, operative procedures or rules of the game may not themselves entail genuinely organizational goals." [Footnote omitted]

Keeley, *supra* note 85 at pp. 151-152.

to distinguish consequences intended by an organisation (goals *of* an organisation) from other consequences. Organisations, as systems of human interactions, can certainly produce consequences that are attributable to the organisation (e.g., profits), since consequences *of* an organisation are more than the aggregate effects of individual behaviour and are independent of their motives. Therefore, it may be possible to establish consequences *of* an organisation by reference to "profits, deficits, goods, services, salaries, growth, pollutants, job-induced injuries, racial discrimination, etc,"[90] all of which may be produced by individual joint behaviour consistent with organisational rules or procedures. By its rules or procedures, however, the organisation itself can neither explain which are the organisational goal for a profit generator, and which are that for a salary or cost generator, nor prefer one over another. Based on these observations, Keeley concludes that while goals *for* and consequences *of* an organisation are identifiable, goals *of* an organisation cannot be established without resort to the intentions of participating individuals.[91]

Focus is now shifted from operational to conceptual flaws from which the four models suffer. According to Laufer, conceptual flaws become apparent when each model of corporate fault is examined in the light of some fundamental legal concepts.[92] One of the problematic features of the corporate fault models is related to the notion of culpability. It may be useful, at first, to explore the meaning of the term "culpability" used in criminal law by reference to the following quotation from Laufer's work.

> "Culpability reflects the notion of blameworthiness and is at issue both prior to and after a conviction. Prior to a conviction, culpability is raised in relation to an entity's liability. Here, courts will examine whether the corporation is sufficiently to blame so as to render it liable. Culpability is considered a second time after conviction, where courts will examine a corporation's blameworthiness to determine sentence severity in an effort to fashion a proportional sentence. The extent to which an actor is blameworthy has a direct effect on a finding of liability which is, after all, a determination of who may be subject to any particular law. A court's determination of an actor's liability and culpability in

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90 *Ibid.* at 152.

91 *Ibid.* at pp. 152-153. Keeley also views what French attempts to establish by referring to statements of purpose as recorded in its certificate of incorporation, annual reports, etc., as corporate policy which is not goals *of* an organisation, but goals *for* an organisation. *Ibid.* at 153.

92 Laufer, *supra* note 1 at pp. 668-674.

relation to an offence will determine a punishment that is proportional."[93]

Given the dual aspect of assessing culpability indicated by Laufer,[94] a central question arises as to whether each model of corporate fault can properly capture corporate culpability both at the pre- and at the post-conviction stages. Since the corporate policy model places exclusive focus on a causal link between corporate features and the employee's illegal conduct under the three circumstances,[95] it may fail to capture corporate culpability at the post-conviction stage.[96]

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93 Laufer, *ibid.* at 650, n.14. This explanation is , of course, only applicable to the common law legal system. In such civil law countries' legal system as Germany and Japan, the term "culpability" is only used at the pre-conviction stage. It is interesting to note that this term has been used by Dando as an English translation of the German concept *Schuld*, one of the elements of the crime both in German and in Japanese criminal law. S. Dando, *The Criminal Law of Japan: The General Part* (1997, Fred B. Rothman & Co., Colorado, translated by B.J. George), ch.7.

The German concept *Schuld* is, roughly speaking, the absence of excuse. After the first two elements of the crime, namely, *Tatbestand* (constituent elements of crime or statutory definitions in which conduct and causation issues are addressed) and *Rechtswidrigkeit* (illegality or the absence of justification such as necessity defence) are fulfilled, the issue of whether grounds of excuse such as mental abnormality and age exist on the part of the defendant will be treated at the last stage, culpability.

The element of subjective mental state is, unlike *mens rea* in the common law system, examined at all stages in relation to the particular issue. Take knowledge as an example. The defendant's knowledge as to the circumstances in which he performed an act is generally considered at the first stage (*Tatbestand*). On the other hand, his knowledge as to the circumstances in which he performed the act as a self-defence against someone's imminent and unjust infringement will be examined at the second stage (*Rechtswidrigkeit*) in relation to a self-defence (justification). Finally, his knowledge as to illegality of his conduct (or circumstances in which he acted without justification) will be examined at the culpability (*Schuld*) stage. The reasonable and prudent person test applies in the first and second stages and, therefore, the grounds of excuse such as insanity and age, as well as the defendant's unawareness of illegality of his conduct, are considered personal to him. If no ground of excuse is proved on his part, then he is finally held criminally responsible and "culpable" for the offence he committed.

In sum, the concept of culpability both in Germany and in Japan is more restricted for the usage than that in common law.

94 As for the notion of blame in relation to culpability, Laufer clarifies its usage as follows:

> "The distinction between culpability and blame.... must be explained. To question whether one is culpable is to ask whether one is properly to blame for a voluntary act.... But the notion of blame changes when the question shifts from whether or not to blame A" to "to what extent should A be blamed." The former goes to culpability in relation to liability, while the latter goes to blameworthiness in relation to allocation of punishment. The latter calls for an assessment of the extent to which the actor should be punished." [Footnote omitted.]

Laufer, *supra* note 1 at 670, n.92.

95 *Supra* text accompanying notes 36 and 37.

96 Laufer, *supra* note 1 at 674. As a matter of fact, Moore, one of the advocates of the corporate policy model, acknowledges that "the corporate character theory is *more* suitable for use at sentencing than at trial." Moore, *supra* note 25 at 768. The same may be said, no doubt, of the aggregation theory whose aim is to fulfill the fault requirements by combining several employees'

In contrast, both proactive and reactive corporate fault models attempt to form the corporate fault in terms of the company's failure to prevent the commission of the offence or to correct the situations in which illegal conduct occurred in the past. But questions regarding the corporate proactive or reactive fault may have little to do with corporate culpability at the pre-conviction stage for two reasons. At first, focus on corporate proactive or reactive attitudes towards the commission of the *actus reus* of the offence provides no equivalent to a corporate *mens rea*. A failure to adopt and implement policies and practices to prevent the employee's offence is, for example, not necessarily equal to a corporate intent to commit the offence. On the contrary, inquiry into the company's proactive failure to prevent the offence can hardly cover or distinguish between corporate intent and corporate negligence.[97] The same seems true of the corporate effort, in reaction to the *actus reus*, to correct illegal conduct by a corporate agent. The corporation's conscious disregard of its agent's harmful act that created a substantial and unjustifiable risk is not necessarily tantamount to a corporate intent to produce the risk.[98] Furthermore, since the reactive corporate fault model still relies on the idea of the imputation concerning the external elements of the offence (*actus reus*),[99] the gap between the actor's mental state in relation to his/her conduct and the company's reactive attitudes towards his/her conduct inevitably occurs. As a result, some confusion may arise as to which faults a company should be blamed for, for the first violation by the agent or for the company's subsequent failure to take remedial

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knowledge and actions. This theory provides no useful information of corporate efforts to prevent or correct the employee's illegal conduct.

97 Fisse, *Reconstructing*, *supra* note 43 at 1190, n.232. Thus, the proactive corporate fault model is best left as a model for an affirmative due diligence defence.

98 Laufer, *supra* note 1 at 673.

99 See Fisse, *Howard*, *supra* note 43 at pp. 606-607, arguing that:

> "There is reason for holding corporations vicariously liable in relation to the external elements of an offence.... In larger companies top managers rarely commit the external elements of an offence because managers of high rank are typically far removed from the scene of the crime; feats of manslaughter.... are usually performed on distant sites by lower and middle level employees. To require that the external elements of an offence be committed by a top level manager is thus greatly to limit the range of cases where a corporation can be held liable as a principal offender."

action.[100] It is for these reasons that both models "are best left as post conviction models of culpability."[101]

Even if corporate proactive or reactive attitudes towards the commission of the employee's offence can meet the requirement of mental states, Laufer continues,[102] both models are unlikely to meet the requirement of contemporaneity that the *actus reus* and *mens rea* of an offence concur in time. The principle of concurrence[103] is sometimes summarised by the maxim that *actus non facit reum nisi mens sit rea* (an act does not make a person guilty, unless his/her mind was guilty). The significance of this principle is best expounded by Jerome Hall as follows:

> "The principle of concurrence requires that the *mens rea* (the internal fusion of thought and effort) coalesce with the additional manifested effort ("act"), that they function externally as a unit to comprise criminal conduct.... [T]his is a way of making certain that the defendant's conduct was criminal, *i.e.* that his conduct actually expressed a *mens*

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100 Bucy, *Ethos*, *supra* note 25 at pp. 1161-1162. See also Clarkson, *supra* note 25, concluding that:

> "The wrongdoing is the original acts or omissions that caused the harm. Culpability must be addressed by reference to those acts or omissions."

It is to be noted, however, that this is not always correct in some individual offender's cases. Consider the following example. A driver D accidentally (not with a gross negligence) hit a pedestrian V on a lonely road, but decided to desert V. V was grievously bodily injured, but was not found nor rescued until he died. D's fault consists both of the first negligent (but not criminal) driving and of the second culpable failure to fulfill a legal duty imposed by Road Traffic Act 1988, s. 170, or omission to rescue V. Apparently, D should be blamed for the second conduct. Another example may be the case in which D accidentally starts a fire and, thereafter, intending to destroy property belonging to another, fails to take any steps to extinguish the fire. D will be charged with the offence of arson (R. v Miller [1983] 2 A.C. 161), which is consisted of D's subsequent omission to take steps to extinguish the fire and intent to destroy property, not of D's first accidental conduct and mental states. For the analysis of the Miller case, see, for example, N. Lacey & C. Wells, *Reconstructing Criminal Law - Text and Materials* (1998, 2nd ed., Butterworths, London), p. 48.

101 Laufer, *supra* note 1 at 672.

102 Laufer, *ibid.* at pp. 672-673.

103 For further details of this principle, see, in general, Smith, *supra* note 24 at pp. 79-81 and "The Guilty Mind in the Criminal Law" (1960) 76 *Law Quarterly Review* 78 at pp. 91-96; R. Card, *Card, Cross and Jones Criminal Law* (1998, 14th ed., Butterworths, London), pp. 76-79; A. Ashworth, *Principles of Criminal Law* (2nd ed., Clarendon Press, Oxford), pp. 155-157; P. Murphy (ed.), *Blackstone's Criminal Practice* (1997, Blackstone Press Ltd., London), pp. 15-16; E. Colvin, *Principles of Criminal Law* (2nd ed., A Carswell Publication, Canada), p. 30; W.R. LaFave & A.W. Scott, *Substantive Criminal Law* (1986, Weet Publishing Co., Minnesota), Vol.1, §3.11; G. Marston, "Contemporaneity of Act and Intention in Crimes" (1970) 86 *Law Quarterly Review* 209; A.R. White, "The Identity and Time of the Actus Reus" [1977] *Criminal Law Review* 148; J. Hall, *General Principles of Criminal Law* (1960, 2nd ed., The Robbs-Merrill Co. Inc., New York), pp. 185-190.

rea."[104]

Viewed in this light, both models, in particular, the reactive corporate fault model, may be at odds with the principle of concurrence that requires focus to be on culpable mental states in concurrent relation to illegal acts, not on fault in reaction to the *actus reus*.

> "[The reactive corporate fault model].... fails to capture a genuine corporate culpability to the extent that a reactive program of a corporation reflects an entity's response to the discovery of an illegal act, rather than the commission itself. Failure to respond adequately to the discovery of an illegality may reveal significant blame, but it is blame in relation to the failure to act, not evidence of an intention in relation to acts that gave rise to the omission."[105]

Consequently, both proactive[106] and reactive corporate fault models do not reflect all types of the state of mind: intention, knowledge, recklessness and (gross) negligence.[107]

Conceptual flaws are also found in the corporate policy model in relation to the issue of descriptive and normative usages of the *mens rea* concept. The difference between descriptive and normative uses of this term is best discussed by George P. Fletcher.[108] According to Fletcher, the confusion between normative and descriptive usage of such a word as "intent" is pervasive in Anglo-American criminal law.

> "The term "intent" may refer either to a state of intending (regardless of blame) or it may refer to an intent to act under circumstances (such as failing to inquire about the age of a sexual partner [in statutory rape cases]) that render an act properly subject to blame. The term "criminal intent" does not resolve the ambiguity, for a criminal intent may simply be the intent to do the act, which, according to the statutory definition, renders the act "criminal," i.e., punishable under the law....

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104 Hall, *supra* note 103 at pp. 185-186.

105 Laufer, *supra* note 1 at 673.

106 *Supra* note 97.

107 Laufer, *supra* note 1 at 724, n.303, stating that:

> "If, for example, PCF [Proactive Corporate Fault] and RCF [Reactive Corporate Fault] were adopted as exclusive fault requirements, corporate culpability would be limited to, at most, reckless corporate action.... [T]he absence of reactive or proactive corporate action suggests a disregard of risks.... However, insofar as an offense explicitly considers the reactive nature of an accused, RCF reflects a constructive fault. If this disregard is willful, then the absence of a reactive or proactive action may reveal a corporate recklessness. If the disregard is inadvertent, then there may be evidence of negligence. In either case, evidence of failed precautions and reactive measures may not rise to a level of purposeful or knowing action."

108 *Rethinking Criminal Law* (1978, Little, Brown and Co., Boston), pp. 395-401.

> It is obvious that the very word "criminal" is affected by the same tension between descriptive and normative illocutionary force. When used normatively, "criminal" refers to the type of person who by virtue of his deeds deserves to be branded and punished as a criminal. When used descriptively, as in the phrase "criminal act" it may refer simply to any act that the legislature has declared to be "criminal." Thus the term "criminal intent" may mean the intent to act under circumstances that make it just to treat the actor as a criminal in the pejorative sense...."[109]

When these observations are considered in analysing the basis for the corporate policy model, it becomes obvious that this model uses such corporate features as policy, character, culture, practice and personality in the normative sense to fulfill the fault requirement.[110] If these features of corporations are used descriptively, the central mission of the pre-conviction stage of culpability assessment must be to prove that they "may be said to have intended harm, wilfully engaged in harmful acts, or had knowledge of wrongdoing"[111] regardless of blame. In failing to do so, the corporate policy model places exclusive focus upon assessing these corporate features which this model already views as blameworthy.[112]

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109 *Ibid.* at p. 397. As for the usage of the term "culpability," Fletcher goes on to say that:

> "It would seem that the term "culpability" ordinarily has normative force, for in non-legal English, a person is culpable only if he is justly to blame for his conduct. It would follow that if conduct were excused by virtue of duress or insanity, the actor would not be culpable. Yet the Model Penal Code [*supra* note 36, §2.02(2)] defines acting purposely and knowingly as "kinds of culpability." Though the code is not explicit in its solecism, it would seem to follow that if a person purposely committed larceny while subject to duress, he would be acquitted; yet it would still be true that he acted culpably."

Ibid. at p. 398.

110 Laufer, *supra* note 1 at 674.

111 *Ibid.*

112 A main reason why the corporate policy model already views corporate features as blameworthy before considering whether a corporation, by these features, can be said to "have intended harm, wilfully engaged in harmful acts or had knowledge of wrongdoing" may lie in the fact that this model fails to provide the appropriate circumstances in which a corporation should be granted defences. Some confusion as to the usages of the *mens rea* or culpability concept may be avoided if this model first examines a causal link between corporate features and the prohibited result, then considers whether any defences are available to the corporation in the appropriate circumstances and, if not, finally views them as blameworthy or culpable.

To capture corporate culpability both at the pre- and at the post-conviction stages properly, thus, three separate issues need to be addressed: at the pre-conviction stage, (1) how to formulate corporate fault (and corporate conduct) for which a corporation can be held liable; (2) in what circumstances or for what reasons it can escape liability; and, at the post-conviction stage, (3) what types of aggravating or mitigating factors should be considered in determining corporate sentencing. In this thesis, the first one will be addressed in Chapter 5 while the last two will be dealt with in Chapter 6.

As the foregoing criticisms demonstrate, the four models of corporate fault have their own flaws in operationalisation and conceptualisation. Furthermore, as examined in the previous section, the scope of the application of each model is so unclear that more than two models may be applied to the same case and that the same factors can be used in different models' favour to capture corporate fault. The solution to the application may be, as implied in the previous section, to attempt to synthesise each model. On closer examination of operational and conceptual flaws, the synthesis of the four models will be found to be the most effective solution to capture genuine corporate fault. The next and final section of this chapter critically analyses the foregoing criticisms concerning these flaws to emphasise the need for systhesis, and also provides an example for the synthesised model of corporate fault by reference to Section 12 of Australian Criminal Code Act 1995.

4.4. The Need for Synthesising Organisation Theories

The previous section sketched the outline of criticisms concerning operational and conceptual flaws from which each model suffers. While focus in Section 4.2. was on finding similarities of the scope of each model's application, emphasis was placed by these criticisms on the difference among four models by indicating distinctive deficiencies which each model has in relation to some basic principles or concepts of criminal law. If operational and conceptual flaws are not surmountable, the synthesis of each model to capture genuine corporate fault may become futile. It is suggested, however, that operational and conceptual flaws result from the fact that over-emphasis is placed by commentators upon one aspect of each model. The first part of this section is devoted to establishing this claim.

Take the operational flaw of the aggregation theory for example. The critical point towards this theory is that the corporate fault is created by aggregating several individuals' action and mental states of different matters, none of which may be pertinent to the particular violation of law. Hence, a corporation may be given, in advance, no opportunity to learn what to do to avoid liability.[113] However, this problem

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[113] *Supra* text accompanying notes 76-78.

is not peculiar to the aggregation theory. The individual offender can be accused of his/her failure to perceive the risk of harm to the others, namely, of gross negligence, if legal duties are imposed on him/her to do so. Whether s/he actually knew what s/he was required to do about the risk is irrelevant to imposing liability for gross negligence.

Given that the aggregation theory holds a company liable for its failure to collect and analyse information possessed by several employees,[114] the basis for this theory can be shared with that for the proactive and reactive corporate fault models, in particular, in cases in which proof of gross negligence is required. The main purpose of this theory to require the company to collect information of employees is, as mentioned earlier,[115] to encourage it to detect and correct the commission of the *actus reus* of an offence. If the company fails to organise the system of communication network in order to shield itself from information as to its employee's criminal conduct, the corporate fault can be formulated with reference to the aggregation theory, as well as proactive and reactive corporate fault models.

Keeley's criticism against the corporate policy model may provide another example.[116] Keeley's argument against this model seems pertinent in that it is impossible to establish that a company can intend certain consequences by itself, without resort to the intentions of its individuals. However, a company's liability for its *involvement* in employees' commission of the *actus reus* of the offence can be established by reference to corporate policy. In fact, Foerschler and Moore's three-prong framework[117] illustrates the appropriate circumstances in which the company can be said to involve itself in the commission of the *actus reus* of an offence by employees.

Conceptual flaws indicated by Laufer[118] are the other illustrations of the same point. Laufer crafts theoretical criticisms against each organisation theory in terms of

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114 *Supra* text accompanying notes 22-24.

115 *Supra* text accompanying note 24.

116 *Supra* text accompanying notes 85-91.

117 *Supra* text accompanying notes 36-37.

118 *Supra* text accompanying notes 92-112.

such fundamental concepts of criminal law as culpability both in the sense of pre- and post-conviction stages and in the descriptive and normative sense, and concurrence of *actus reus* and *mens rea*. It is certain that all organisation theories fail to meet the requirements of assessing culpability either at pre- or at post-conviction stage, or that some of them are not consistent with the principle of concurrence. However, it is also certain that all organisation theories share some common features which Laufer overlooks. The advocate(s) of the proactive corporate fault model suggested that corporate response to employee's illegal conduct, such as adequate remedies including "disciplining wrongdoers and insuring prompt repair of conditions conductive to future violations," should also be the basis for assessing the reasonableness of corporate practices and procedures.[119] Foerschler and Moore's three-prong framework, too, includes corporate reactive attitudes towards the violative act of employees in three circumstances in which a corporation should be held liable under the corporate policy model, by use of the terms "endorsement" and "ratification."[120] Fisse and Braithwaite also consider the corporation's failure to take preventive measures, as well as to take remedial actions, against the commission of the offence to be the basis for their reactive corporate fault model.[121] Such multiple aspects of organisation theories may deny the applicability of one or some of Laufer's criticisms to every model.[122]

The fact that criticisms against four models of corporate fault are based on commentators' over-emphasis on only one aspect of each model justifies the need for synthesis of these models to capture genuine corporate fault. Nevertheless, the lesson to be learnt from Laufer's criticisms concerning operational and conceptual flaws is that the theory of corporate liability still needs to be consonant with fundamental concepts or principles of criminal law, such as concurrence between *actus reus* and *mens rea*, culpability, conduct and causation. Therefore, before an attempt is made to establish

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119 *Developments in the Law*, *supra* note 38 at 1258.

120 *Supra* text accompanying notes 36-37.

121 *Supra* text accompanying note 46.

122 For example, since the corporate policy considers the corporate reactive attitudes towards the employees' violative act, this model does say much about culpability at the post-conviction stage. See *supra* text accompanying note 96.

the genuine corporate fault by synthesising each model, it is essential to consider and, if necessary, reconstruct the relevant principles of criminal law.

The necessity for reconstructing criminal law in the context of corporate liability becomes apparent when the adequacy of Coffee's criticism against the adoption of a due diligence defence and of Clarkson's criticism against the reactive corporate fault model is examined. Coffee's criticism is based on the gap between how to establish this defence and how to prevent the offence.[123] Clarkson's criticism is concerned with uncertainty of what corrective steps would be sufficient to exculpate a corporation from liability and for what offence. These concerns will be irrelevant if the proactive and reactive corporate fault models are properly reconstructed in relation to the issue of causation. Namely, the legal framework relevant to causation between corporate conduct and corporate fault needs to be presented to cover the appropriate circumstances in which the corporate preventive or reactive fault may reasonably be said to have a causal link with the prohibited consequences.

The following legislation may provide an example of a synthesised corporate fault model which lacks full considerations of the issue of conduct and causation. The rest of this section will be devoted to analysing Section 12 of Australian Criminal Code Act 1995.[124] The Act incorporates several approaches of corporate liability: the doctrine of vicarious liability; identification principle or high managerial agent approach;[125] aggregation theory; and proactive and reactive corporate fault and corporate policy models. Under the Act, the *actus reus* or physical elements of an offence are fulfilled by reference to the vicarious liability doctrine, so that a corporation may be held vicariously liable for offences of strict liability.[126]

In cases in which intention, knowledge or recklessness is a fault element (*mens*

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123 *Supra* text accompanying notes 79-80.

124 For detailed arguments of this Act, see, for example, Rose, *supra* note 25; Laufer, *supra* note 1 at pp. 678-681; Colvin, *supra* note 25 at pp. 34-40.

125 For this term's definition, see *supra* note 36.

126 Australian Criminal Code Act 1995, Section 12.2.

rea) in relation to a physical element of an offence, a corporation may be held liable for expressly, tacitly or impliedly authorising or permitting the commission of the offence by proving that (1) its board of directors or (2) its high managerial agent intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; (3) a corporate culture existed within the corporation that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or (4) the corporation failed to create and maintain a corporate culture that required compliance with the relevant provision.[127]

In cases where negligence is a fault element in relation to a physical element of an offence and no individual has that fault element, the corporation may be held liable when the corporation's conduct is viewed as a whole, that is, by aggregating the conduct of any number of any corporate agents.[128] On the other hand, the corporation may be exempt from liability if (1) an individual actor of the corporation was under a mistaken but reasonable belief about facts that would have meant that the conduct would not have constituted an offence; and (2) the corporation exercised due diligence to prevent his/her conduct.[129]

Corporate negligence or failure to exercise due diligence may be proved by the fact that the prohibited conduct was substantially attributable to (a) inadequate corporate management, control or supervision of the conduct of one or more of its agents; or (b) failure to provide adequate systems for conveying relevant information to relevant persons in the corporation.[130]

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127 *Ibid.*, Section 12.3. Section 12.3 (4) provides relevant factors to the application of "corporate cultures" that appear in (3) and (4) as follows:

(a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and

(b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.

128 *Ibid.*, Section 12.4.

129 *Ibid.*, Section 12.5.

130 *Ibid.*, Sections 12.4 (3) and 12.5 (2).

Under the Act, corporate liability for *mens rea* offences (other than offences requiring negligence) resorts to several approaches which were already examined in this thesis. When senior management are involved in the commission of an offence, the corporation is held liable under the identification principle. The involvement may consist of direct engagement in the offence, express, tacit or implied authorisation or permission of the offence committed by the other(s). Even if such involvement of the senior management is not proved, the corporation can still be held liable for its culture either which encouraged, tolerated or led to the violation of law, or which the corporation failed to create and maintain to ensure that its employees' conduct comply with the law. Since corporate cultures can also be proved in a manner that the commission of the offence was tolerated by the corporation, account is taken of corporate reactive attitudes towards its employee's illegal conduct. The corporation's proactive fault, namely, its failure to prevent the conduct by its agent(s) or its senior management's authorisation or permission of the offence, is considered to constitute a due diligence defence. In addition, the aggregation theory is utilised to hold the corporation liable for offences requiring negligence. The Act allows the court to aggregate not only the negligence of several senior officers, but also that of any corporate agents to comprise corporate negligence. The basis for the aggregation theory, that is, the corporation's failure to establish a system for communications concerning the relevant information, is also used to prove corporate negligence or absence of due diligence.

On closer examination, some theoretical inconsistencies become evident in the Act. Suppose that one of the lower-level employees of a corporation, A, performed a violative act with a reasonable expectation that his superior B who, as a high managerial agent, would have authorised A's violation. And it is proved that B knew nothing about A's conduct and, therefore, could not authorise, permit or tolerate A's violation. In addition, there is proof that the corporation failed to create and maintain a corporate culture that required compliance with the relevant law.

In this hypothetical example, the Act would make the corporation liable for A's offence requiring knowledge, since proof of A's reasonable expectation about B's

authorisation may make it possible to constitute corporate cultures which failed to make sure of compliance.[131] As for the *actus reus* requirement, A's conduct comprises physical elements of the offence. Apart from corporate negligence, however, it is not certain how the corporation can be blamed for "knowing" violation. Whilst the corporate culture existed that failed to ensure the compliance, B's lack of knowledge as to A's violative conduct surely denies one of four ways in which a fault element is to be fulfilled.[132] B's lack of knowledge may imply the fact that the corporation also failed "to provide adequate systems for conveying relevant information to relevant person in the corporation",[133] which is concerned with corporate negligence.

If applied in this case, the doctrine of vicarious liability may provide the same answer. A's mental states and act are simply imputed to the company which failed to prevent A's commission of the offence. Unlike the Act, there is no need to consider the existence of a corporate criminogenic culture. B's lack of knowledge as to A's violation and the corporation's failure to take precautions may nullify a due diligence defence, so that the corporation cannot avoid liability.

The reason for this is simple: the Act, despite its adoption of several approaches, fails to provide the reasonable connection between the employee's conduct and corporate fault. Since the Act still depends on the concept of imputation as to physical elements, two confusions always arise: (1) whose conduct should fulfill physical elements of the offence, conduct of the actual offender or that of a high managerial

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131 *Supra* note 126, Section 12.3(4)(b) of the Act.

132 *Supra* text accompanying note 126, (2). As cited in *supra* note 126, proof of a corporation's failure to establish a corporate culture of compliance is one of four ways in which intention, knowledge or recklessness is to be proved. Yet, Colvin argues that:

> "a failure to develop a culture of compliance is a form of negligence. This may well be an appropriate ground on which to hold a corporation responsible for the commission of offenses of negligence. It is questionable, however, whether it is an appropriate ground on which to hold a corporation responsible for the intentional, knowing, or reckless commission of an offense. The distinction between offenses of negligence and offenses requiring subjective fault can be significant for penalty levels and social stigma. It is a distinction that should be respected in any scheme of corporate liability, even if subjective fault is conceived somewhat differently for corporations than for individuals."

Colvin, *supra* note 25 at 37.

133 *Supra* text accompanying note 130. In this hypothetical example, A's violative act itself may be sufficient to prove the corporation's failure to establish a culture of compliance under the Act.

agent, etc, who authorised the offender's conduct? and (2) whose fault in relation to the offender's conduct should constitute corporate cultures or proactive fault, the offender's fault or his superior's supervisory or proactive fault? If a high managerial agent, for example, recklessly authorised his inferior's intentional conduct, which mental states should be viewed as corporate fault in relation to physical elements of the offence? And which faults should be viewed as causally linked with the prohibited consequences?

The lesson to be learnt from the Australian Criminal Code Act 1995 is that it is not sufficient just to combine several theories to capture corporate fault. Careful considerations should be given to the systhesis of each model by reference to fundamental principles and concepts of criminal law. This is the central task of the next chapter which proposes genuine corporate fault and conduct in cases of corporate manslaughter. Attempts are made therein to explore the requirements of *actus reus* and *mens rea* in order to make the proposed model of corporate liability for manslaughter fully compatible with conventional criminal law theories which have been tailored to cases of individual manslaughter.

CHAPTER 5

A NEW MODEL OF CORPORATE LIABILITY FOR MANSLAUGHTER

5.1. Introduction

The previous chapter examined the applicability of the aggregation theory and several organisation theories to corporate manslaughter cases, and indicated the operational and conceptual flaws from which each theory suffers. While the operational flaws stem from uncertainty or infeasibility of some ideas used in each theory, (*e.g.* the basis for aggregating several individuals' fault, the extent to which a corporation can establish a due diligence defence, the relationship between a human intentionality and a corporate policy, and the type of corrective actions necessary for the corporation to take), the conceptual flaws result from each theory's incongruity with such fundamental criminal law concepts as concurrence of *actus reus* with *mens rea*, culpability both at the pre- and at the post-conviction stages, and descriptive and normative usages of *mens rea*.

These flaws suggest that the existing theories, including the doctrine of vicarious liability and the principle of identification, have failed to provide an exclusive unifying model of corporate liability by which both corporate and individual offenders can be held liable for manslaughter under the same conditions. The main aim of this chapter is to propound a new model of corporate criminal liability for manslaughter,[1] by equating the requirements of conduct and mental states for individual manslaughter with those for corporate manslaughter. While Section 5.2. endorses the need for equating corporate and individual manslaughter by referring to the Law Commission's recent proposals for reform of the present law of involuntary manslaughter,[2] the subsequent sections address the following three issues.

The first issue to be dealt with is how to distinguish between individual and

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1 This will later be called the "risk-oriented theory."

2 Law Commission No.237, *Legislating the Criminal Code: Involuntary Manslaughter* (1996, HMSO, London) [hereinafter cited as *Involuntary Manslaughter*].

corporate blameworthiness. In most cases of corporate manslaughter, as Chapter 3 revealed, the particular individual's conduct is the immediate cause of the catastrophic consequences, so that several commentators have argued that blame for the prohibited result should directly be attached to this individual actor, rather than to the corporation itself.[3] However, as far as corporate manslaughter cases are concerned, it is likely that the particular individual's conduct related to the result implies the existence of fault on a "more widespread organisational basis".[4] In referring to several theories of the requirement of culpability, Section 5.3. delineates the appropriate circumstances in which the corporation, rather than any individual, should be blamed for the prohibited result.

The second issue also concerns the issue of corporate culpability: for what type of conduct should the corporation be blamed? As described in the proceeding chapters, all of the existing theories have recourse to the particular individual's conduct in order for the corporate defendant to fulfill the requirement of conduct. It is from this recourse, however, that the gap occurred between corporate fault and the individual conduct and, thus, the concurrence of *actus reus* with *mens rea* had been ignored. A clue to this issue is the concept of the risk, which has been necessary to determine the type of conduct in most cases of individual manslaughter. Section 5.4. formulates corporate conduct by analysing the meaning of the risk.

The third and final issue is how to construct the requisite mental states of the corporation, namely, corporate recklessness and corporate gross carelessness in cases of manslaughter. As examined in the previous chapter, the organisation theories have

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3 See, for example, E. Lederman, "Criminal Law, Perpetrator, and Corporation: Rethinking a Complex Triangle" (1985) 76 *Journal of Criminal Law and Criminology* 285; R. Hamilton, "Corporate Criminal Liability in Texas" (1968) 47 *Texas Law Review* 60; B. Coleman, "Is Corporate Criminal Liability Really Necessary" (1975) 29 *Southwestern Law Journal* 908; P.B. Rodella, "Corporate Criminal Liability for Homicide - Has the Fiction Been Extended too Far?" (1984) 4 *Journal of Law and Commerce* 95; S.J. Wragg, "Corporate Homicide: Will Michigan Follow Suit?" (1984) 62 *University of Detroit Law Review* 65; D.v. Ebers, "The Application of Criminal Homicide Statutes to Work-Related Death: *Mens Rea* and Deterrence" (1986) 86 *University of Illinois Law Review* 969; S.R. Weinfeld, "Criminal Liability of Corporate Managers for Deaths of their Employees: People v. Warner-Lambert Co." (1982) 46 *Albany Law Review* 655.

4 B. Fisse, *Howard's Criminal Law* (1990, 5th ed., Law Book Co., Sydney), p. 603.

attempted to form the corporate fault by reference to such unique features of the corporation as policies, practices, cultures or ethos, but have also been subject to criticism that they encounter some difficulty in reconciling the use of these features with fundamental criminal law principles. The reason for this, as mentioned earlier, stems from their failure to equate the type of corporate fault with that of individual fault, in particular, in cases of manslaughter. The notion of corporate policy is, for example, hardly found in cases of individual manslaughter, so that it cannot be regarded as equivalent to the relevant concept of criminal law which has been aimed at individual offenders, such as recklessness. By examining the Law Commission's recent proposals for reform of the present law of *individual* manslaughter, Section 5.5. provides an alternative concept of corporate mental states required for *corporate* manslaughter. Then, Section 5.6. compares the new approach suggested in this chapter with other theories of corporate liability, in its attempt to justify several advantages over the existing models of corporate liability.

5.2. Individual and Corporate Manslaughter

For the requirements of *actus reus* and *mens rea* for offences of manslaughter to be clarified, a good place to start is Law Commission's recent proposals for legislating involuntary manslaughter.[5] In its attempt to legislate new types of the offence of unintentional killing, the Law Commission has made some interesting proposals for reform of the present law. Under the proposals, offences of unintentional killing are mainly divided into individual and corporate manslaughter. The offence of individual manslaughter is subdivided into reckless killing and killing by gross carelessness.[6] As for individual manslaughter, on the one hand, the new offence of reckless killing would

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[5] Law Commission, *Involuntary Manslaughter*, *supra* note 2. For a useful comment on this report, see M. Stallworthy, "Rationalising the Law of Manslaughter and Dabbling in Corporate Crime" (1997) 61 *Journal of Criminal Law* 324.

[6] No modification has been made by Law Commission concerning the existing offences of motor manslaughter (causing death by bad driving) and the concept of omissions (namely, the duty to act governed by the common law). Law Commission, *Involuntary Manslaughter*, *supra* note 2 at paras. 5.62-5.56 and paras. 5.42-5.45 respectively. In addition, it has been recommended that unlawful act manslaughter or constructive manslaughter, in which a person is held responsible for causing a result that he did not intend or foresee, and which would not even have been foreseeable by a reasonable person observing his conduct, should be abolished. *Ibid.* at paras. 5.14-5.16.

be committed "if (1) a person by his/her conduct causes the death of another; (2) s/he is aware of a risk that his/her conduct will cause death or serious injury; and (3) it is unreasonable for him/her to take that risk, having regard to the circumstances as s/he knows or believes them to be."[7] Next, the new offence of killing by gross carelessness would be committed "if (1) a person by his/her conduct causes the death of another; (2) a risk that his/her conduct will cause death or serious injury would be obvious to a reasonable person in his/her position; (3) s/he is capable of appreciating that risk at the material time; and (4) *either* (a) his/her conduct falls far below what can reasonably be expected of him/her in the circumstances, *or* (b) s/he intends by his/her conduct to cause some injury, or is aware of, and unreasonably takes, the risk that it may do so, *and* the conduct causing (or intended to cause) the injury constitutes an offence."[8]

On the other hand, a special offence of corporate killing broadly corresponds to the individual offence of killing by gross carelessness. Like the individual offence, "the corporate offence should be committed only where the defendant's conduct in causing the death falls far below what could reasonably be expected." However, unlike the individual offence, "the corporate offence should *not* require that the risk be obvious, or that the defendant be capable of appreciating the risk; and for the purposes of the corporate offence, a death should be regarded as having been caused by the conduct of a corporation if it is caused by a failure, in the way in which the corporation's activities are managed or organised, to ensure the health and safety of persons employed in or affected by those activities."[9] As for the issue of causation, it has been recommended that " it should be possible for a management failure on the part of a corporation to be a cause of a person's death even if the immediate cause is the act or omission of an individual."[10] As regards potential defendants of the offence of corporate killing, an individual is regarded under the proposal as incapable of the offence of corporate

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7 Law Commission, *Involuntary Manslaughter*, *ibid.* at para. 5.13.

8 *Ibid.* at para. 5.34.

9 *Ibid.* at para. 8.35. The term "a failure, in the way.... to ensure...." is referred to as a "management failure." *Ibid.* at para. 8.19.

10 *Ibid.* at para. 8.39.

killing, "even as a secondary party."[11]

The most noticeable difference between individual and corporate manslaughter under the proposals lies in the Law Commission's view that corporations are "only metaphysical entities,"[12] which leads to the omission of two key requirements of individual manslaughter; the awareness of the risk in the offence of reckless killing and the obviousness of the risk to a reasonable person in the offence of killing by gross carelessness.

> "To hypothesise a human being, who *could* be in the same position as the corporation is a logical impossibility, and it would therefore be meaningless to enquire, as in the offence of killing by gross carelessness, whether the risk would have been "obvious" to such a person. Moreover, corporations have no "capacity", in the sense in which we use that term in this report in relation to an individual, so that it would be equally impossible to enquire whether the defendant corporation had the capacity to appreciate the risk. It is also, in our view, unnecessary. In judging the conduct of an individual defendant, the law must in fairness take account of such personal characteristics as may make it harder for her to appreciate risks that another person would appreciate; but the same considerations scarcely apply to a *corporate* defendant."[Footnote omitted][13]

The logical inconsistency inherent in this quotation is, of course, concerned with the term "capacity" to appreciate the risk. If corporations are considered incapable of appreciating the risk because they are "only metaphysical entities," they must also be considered incapable of fulfilling the conduct requirement. Nevertheless, the Law Commission has clearly recommended that the legal requirement under the present law to identify individuals within the company whose *conduct* is to be attributed to the company itself should be removed.[14] As suggested in Chapter 2,[15] the Law Commission

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11 *Ibid.* at para. 8.58.

12 *Ibid.* at para. 8.3.

13 *Ibid.*

14 *Ibid.* at para. 8.4. Yet, the Law Commission envisages juries finding whether a risk "was, or should have been, obvious to any individual or group of individuals within the company who were or should have been responsible for taking safety measures, in deciding whether the company's conduct fell below the required standard." *Ibid.* On this point, see, in particular, G.R. Sullivan, "The Attribution of Culpability to Limited Companies" (1996) 55 *Cambridge Law Journal* 515 at 531, indicating that:

> "If, despite talk by the Commission of the existence of an organisational liability not reducible to individual liability, we take seriously its professed belief that corporations are legal as opposed to real entities, a finding of sufficiently egregious failure must rest on the managerial or organisational failures of associated individuals. This must lead, irrespective of the Commission's intentions, to the use of aggregation in obtaining corporate convictions

may still adhere to the opinion that it is easier to construct corporate omissions than corporate positive acts. The new concept introduced under its proposals "a management *failure*" may endorse this point.

However, the requirement of a failure or omission to act in offences of omission is premised upon the fact that the defendant was capable of performing a certain positive act at the material time.[16] Thus, the logical conclusion must be that if corporations are such metaphysical entities that they have no capacity to appreciate the risk, they are also incapable both of positive acts and of omissions. If it is desirable to regard the corporation as capable of fulfilling the fault element in terms of the introduction of the concept "a management failure," instead of resort to the idea of imputation, the subjective (namely, awareness and obviousness) and physical (conduct) elements should be fulfilled in the same way. As Clarkson has pointed out, the creation of a separate offence of manslaughter "would be perceived as different from 'manslaughter' or the new substitute offences [individual manslaughter by recklessness and gross carelessness]", which "could lead to a downgrading of the stigma and seriousness of the enforcement."[17]

For the corporation's conviction for corporate manslaughter to achieve the same degree of the stigma as the offence of individual manslaughter, it is necessary, not to abandon the subjective elements of individual manslaughter partially in the offence of

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> and should this occur...."[Footnote citing the same paragraph of the Law Commission's report quoted above omitted]

15 Chapter 2, n.103.

16 See, for example, A. Ashworth, "The Scope of Criminal Liability for Omissions" (1989) 105 *Law Quarterly Review* 424 [hereinafter cited as *Omissions*] at pp. 449-451 (in which the term "capacity" to act is used). See also §2.01(1) of the American Model Penal Code (1985, The American Law Institute, Philadelphia), providing that:

> "A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable."

17 C.M.V. Clarkson, "Kicking Corporate Bodies and Damning Their Souls" (1996) 59 *Modern Law Review* 557 at 569. He goes on to say that:

> "If a company has killed recklessly or by gross carelessness, there are strong fair labelling reasons that only a conviction for the full offence will convey adequately the seriousness of the crime and communicate the appropriate degree of rejection of the wrongdoing."

Ibid. at pp. 569-570. The Law Commission's management failure approach itself will be examined in Section 5.6.

corporate manslaughter, but to equate the requirements of individual manslaughter and those of corporate manslaughter. The issue of how to apply the physical and subjective elements of individual manslaughter by recklessness and gross carelessness under the Law Commission's proposals to corporate manslaughter will be addressed in the subsequent sections.

5.3. Corporate Culpability and Collective Actions

To equate the physical and subjective elements of individual manslaughter with those of corporate manslaughter, the first step to be taken is to apply several theories concerning the requirement of culpability in cases of individual offenders to a corporation so as to justify the imposition of criminal liability for manslaughter upon a corporate offender independently of its personnel. A general issue of how to justify the imposition of criminal liability upon an (individual) offender has often been the subject of controversy in Anglo-American law.[18] For the offender to be guilty of a *mens rea* offence, the state must provide proof not only of the existence of *mens rea* but also of the absence of any defence raised. The central question is why the offender is to be

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[18] On this subject, see, in general, M.D. Bayles, "Character, Purpose, and Criminal Responsibility" (1982) 1 *Law and Philosophy* 5; A. Brudner, "A Theory of Necessity" (1987) 7 *Oxford Journal of Legal Studies* 339; N. Lacey, *State and Punishment - Political Principles and Community Values* (1988, Routledge, London), pp. 58-78; J. Hampton, "Mens Rea" (1990) 7 *Social Philosophy and Policy* 1; M.S. Moore, "Choice, Character, and Excuse" (1990) 7 *Social Philosophy and Policy* 29; L.A. Locke, "Personhood and Moral Responsibility" (1990) 9 *Law and Philosophy* 39; R.A. Duff, "Auctions, Lotteries, and the Punishment of Attempts" (1990) 9 *Law and Philosophy* 1; P. Arenella, "Character, Choice and Moral Agency: The Relevance of Character to our Moral Culpability Judgments" (1990) 7 *Social Philosophy and Policy* 59 [hereinafter cited as "*Character*"] and "Convicting the Morally Blameless: Reassessing the Relationship between Legal and Moral Accountability" (1992) 39 *UCLA Law Review* 1511 [hereinafter cited as "*Reassessing*"]; J. Horder, "Criminal Culpability: The Possibility of a General Theory" (1993) 12 *Law and Philosophy* 193.

The name of this subject varies according to commentators, such as "the theory of criminal responsibility" (Bayles), "the principles of criminal culpability" (Horder), "the concept of culpability (Hampton), "the theory of excuse" (Moore), "the philosophical basis of the principle of responsibility" (Lacey), or "the problem of moral culpability" (Arenella). Since the question raised and addressed in this section is concerned with the concept of "culpability" briefly referred to in the previous chapter (Chapter 4, text accompanying note 93), the term "requirement of culpability" is chosen here.

It is also to be noticed that the main purpose of describing each theory on this issue here is neither to examine their adequacy critically nor to advance an exclusive unitary theory of culpability, but, as will be seen later, to clarify the difference between the practical basis for individual culpability and that for corporate culpability by applying each theory to the case of corporate crime.

blamed for his conduct when the requirement of culpability pertaining to the crime at issue is met.

In general, three theories have hitherto been advocated by commentators to justify the requirement of culpability: theories of defiance, choice or capacity and character.[19] The defiance theorist argues that one who causes harm intentionally, knowingly or recklessly should be considered to act in defiance of those legal norms which he has a duty to obey, and should be condemned and punished for what he does.[20] In cases where he "chooses to defy what [he] knows to be an authoritative moral command in the name of the satisfaction of one or more of [his] wishes,"[21] his intentional, knowing or reckless conduct of causing harm becomes a sign of the defiance in attitude towards the legal command. Whilst the sign of the offender's defiant mind is the mark of culpability, the existence of conditions of justification or excuse on his part would provide evidence to rebut any inference of his defiant attitude towards the law.[22]

Moreover, the choice or capacity theorists argue that the intentional or reckless wrongdoer who, instead of exercising his capacity to avoid wrongdoing, chooses to engage in wrongdoing should be culpable for his choice.[23] In cases where the offender acts in self-defence, under duress or provocation, he is excused "because and only because at the moment of such action's performance, one did not have sufficient

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19 The other theory is called "an agency theory," which claims that the offender's culpability is shaped by how close to or how distant from the paradigm that the actual occurrence of harm is equal to the harm intended by the offender through his conduct. Horder, *supra* note 18 at pp. 209-214. However, as properly indicated by Clarkson, this is not a theory of culpability in that it fails to explain why the offender deserves blame for his conduct. Clarkson, *supra* note 17 at 567, n.75.

20 Hampton, *supra* note 18 at pp. 2-10.

21 Hampton, *ibid.* at 15.

22 *Ibid.* at 25.

23 Moore, *supra* note 18 at 57. The Law Commission calls this theory "subjectivist theory." See Law Commission, *Involuntary Manslaughter*, *supra* note 2 at "Part IV."

capacity or opportunity to make the choice to do otherwise."[24] A similar explanation is given by Hart that in making a culpability judgment, a central question is whether the offender had both the physical and moral capacity to control his actions, and a fair opportunity to avoid performing the wrongful act.[25] If he had the capacity and opportunity to do otherwise than he did and genuinely chose to act, but left the capacity unexercised and missed the opportunity, it would be fair to blame him. As a result, those who lack the moral capacity (children or insane persons) or physical capacity (persons acting under duress) cannot be blamed for their actions due to the lack of a fair opportunity to avoid wrongdoing.

Finally, the character theorist maintains that a culpability judgment is a matter of focusing on undesirable character traits displayed by the offender who causes the harm to the victim.[26] Namely, to cause harm intentionally, recklessly or negligently, and without valid justifications or excuses, is to demonstrate a practical indifference to the interests of the victim which deserves blame.[27] The existence of any exculpatory defence can, however, rebut an inference of bad character of the actor whose moral characters are neither mature (in cases of children) nor ordinarily developed to display in action (in cases of the insane).

The foregoing discussion suggests that the basis for the requirement of culpability varies according to each theory, such as the offender's defiant attitude, choice, capacity or bad character which manifests itself through his/her wrongful conduct. One thing, however, is common among each theory: account is not adequately taken of corporate offenders. In cases of individual offenders, it is always the same person who intentionally, recklessly or negligently acts and causes the harm to the victim and, who has the physical and moral capacity or a fair opportunity (the choice or

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[24] Moore, *supra* note 18 at 29. The concept of "choice" is, of course, premised upon a comparison between alternative courses of action. See A. Duff, *Intention, Agency and Criminal Liability* (Blackwell, Oxford, 1990), pp. 44-47.

[25] H.L.A. Hart, *Punishment and Responsibility* (1968, Clarendon Press, London), pp. 181-182, 201 and 22-23.

[26] Bayles, *supra* note 18 at 7.

[27] *Ibid.* at 18.

capacity theory) to dissuade him/herself from engaging in wrongful conduct. This formula also holds true of the defiance theory and character theory: one who actually performs the wrongful conduct and one who has the defiant attitude towards the legal norm (the defiance theory) or undesirable bad character traits (the character theory) is identical in cases of individual offenders.

These observations can also be applied to some cases of individual offenders in corporate contexts. When, for example, the corporate personnel who decided to defy the legal norm (the defiance theory), chose to engage in wrongdoing, left his/her capacity to avoid wrongdoing unexercised (the choice or capacity theory), or undesirable character traits (the character theory), intentionally performed the violative act, such a violation is merely this rogue individual's crime committed in his/hers personal capacity.[28] Nevertheless, there are many cases, in particular, cases of corporate manslaughter examined in Chapter 3, in which only a corporation should be blamed for the prohibited result even if some individuals are involved in the particular causal chain

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[28] Colvin has suggested that even in cases in which a rogue individual intentionally commits an offence, a corporation can and should be held liable for its negligence in the following special circumstances:

> "Suppose.... that a manufacturer of firearms and ammunition fails to take adequate precautions in hiring employees and in exercising custody of its products. An employee then steals an automatic weapon and uses it to commit mass murder. The corporation can be blamed for the deaths and, if the degree of negligence was sufficiently great, should be held liable for manslaughter. It is immaterial that the murders may have given no benefit to the corporation, that it suffered the loss of the weapon, and that the use of the weapon was unconnected with any manufacturing operations. Corporations can and should take care to prevent the foreseeable use of their structures and resources to cause harm in the pursuit of private, as well as organizational ends." [Footnote omitted]

E. Colvin, "Corporate Personality and Criminal Liability" (1995) 6 *Criminal Law Forum* 1 [hereinafter cited as *Corporate Liability*] at pp. 28-29. Colvin applies "the established common law duty to exercise reasonable care" to the above example when the corporation was in charge of dangerous things. *Ibid.* at 28, n.75. See also J. Gobert, "Corporate Criminality: New Crimes for the Times" [1994] *Criminal Law Review* 722 at pp. 732-733, stating that:

> "For example, assume a company has on its premises dangerous explosives which it leaves unattended. The explosives are stolen and used in a terrorist bombing. Under the proposed test the company may be criminally liable - not as an accessory to the bombing, but for failing to prevent the theft. The company's fault lies in not taking adequate precautions to safeguard the explosives from theft. Of course, the company would have available a defence of due diligence if it could show that it in fact took reasonable steps to avert the theft." [Footnote omitted]

It should be noted that whilst Colvin maintains that the company should be held liable for the deaths of the potential victims, Gobert asserts that corporate liability is based on its failure to prevent the theft, not for the deaths of the victims. The point is that in both cases, the corporation is unlikely to be held liable for its failure to prevent the theft's subsequent intentional offences.

of the prohibited result. For example, when it is proved that the corporation failed properly to train or supervise its employees who were in the nearest position to the source of risk at issue and, accordingly, their conduct caused the prohibited result, it is not these individuals, but the corporation itself that should be held culpable for its lack of the relevant supervision or training system.

Therefore, for each theory of culpability to be applied to the corporate offender, it is necessary to regard acts of any individuals as cogs of the whole safety systems designed to prevent the prohibited result, and to determine whether such a system adopted by the corporation is sufficiently effective to reduce the probability of the occurrence of the result at the material time. If it is proved that the relevant safety system is not sufficient, then it is reasonable to assume that it is not the individuals behind the corporate mantle, but organisations that "are blamed in their capacity as organisations for causing harm or taking risks" or for failing "to exercise [their] collective capacity to avoid the offence which blame attaches."[29]

In considering corporate culpability or blameworthiness, the emphasis should be placed upon the fact that "corporate" blame is attached to the corporation which *collectively* (or as an organisation) fails to avoid (1) the prohibited consequences in terms of the lack of safety system; or (2) the violative conduct of individuals who are not properly trained or supervised by the corporation. Although corporations "are merely fictions of law to better deal with .... claims and obligations of [natural persons], "there is nothing fictitious or figurative about group action itself."[30] Any members of a corporation (including senior officers) who are involved in group or collective action

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29 B. Fisse & J. Braithwaite, *Corporations, Crime and Accountability* (1993, Cambridge University Press), p. 25.

30 J.F. Francis, "Criminal Responsibility of the Corporation" (1924) 18 *Illinois Law Review* 305 at pp. 306 and 308 respectively. For the concept of collective responsibility, see, for example, P.A. French, *Collective and Corporate Responsibility* (1984, Columbia University Press, New York); H. Mannheim, *Group Problems in Crime and Punishment and Other Studies in Criminology and Criminal Law* (1971, 2nd ed., Patterson Smith, New Jersey), ch.2; L. May, *The Morality of Groups: Collective Responsibility, Group-Based Harm, and Corporate Rights* (1987, University of Notre Dame Press, Indiana).

should be considered "mere replaceable cogs in the ever-spinning corporate wheel,"[31] because "the entire personnel of an organisation may change without reshaping the corporate culture."[32] Central to the concept of corporate blame is not these individuals, but a corporation which "may have the intellectual, technical, and financial resources to take protective actions that would be beyond the capacity of an individual actor,"[33] through whose conduct the corporation's collective action causes harm to the victim.

To develop these observations as to collective actions and corporate blame, it may be useful to refer to Benjamin's work on the concept of collective responsibility.[34] Benjamin has classified the form of collective action and responsibility into the following three types. The first type is exemplified in a case in which A, B, and C, comprising the department X, all buy dope and sell it to students. In this case, the X's collective responsibility for the buying and selling of dope is "nothing more than an aggregate of the individual responsibilities",[35] and each actor is to be held liable as a (joint) principal.

The second type exemplified by Benjamin is that each member of X does not perform the whole part of the conduct of buying dope and selling it to students. A buys large quantities of narcotics in New York (he alone has the contracts); B packs and stores the stuff in his basement (he alone has the safe storage space); and C makes the transactions with the students (he alone has their trust). In this case, too, there is no

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31 H.J. Glasbeek, "Why Corporate Deviance is not Treated as a Crime - The Need to Make "Profits" a Dirty Word" (1984) 22 *Osgoode Hall Law Journal* 393 at 434.

32 Fisse & Braithwaite, *supra* note 29 at p. 22. The reason why conduct and mental states of controlling officers or high managerial agents are considered those of the corporation consists in the fact that they are likely to or reasonably assumed to represent the relevant corporate policy. See §2.07(4)(c) of the American Model Penal Code, cited in Chapter 4, n.36. As pointed out in Chapter 2 (text accompanying note 230), therefore, those whose acts and mental states it is desired by courts to ascribe to the corporation falls within the definition of the terms "controlling officers" or "high managerial agents."

33 Colvin, *Corporate Liability*, *supra* note 28 at 27.

34 M. Benjamin, "Can Moral Responsibility be Collective and Nondistributive?" (1976) 4 *Social Theory and Practice* 93.

35 Benjamin, *ibid.* at 94.

difficulty in blaming X for each member's piece of conduct.[36] Benjamin observes that "One factor common to each of these cases is that any justifiable ascription of moral or legal responsibility to the collective is *distributive* without .... remainder over the members comprising the group."[37]

The third type of collective action and responsibility is illustrated by the following example in which the moral or legal responsibility of the group is *not* reducible to the responsibility of its members.

> "Imagine a small frontier township in the nineteenth-century American West. For purposes of law and order the citizens form themselves into a vigilante committee. From the very beginning, however, the committee has not been concerned with administrating proper justice, but with protecting the interests of its citizens against those of strangers and citizens of other nearby townships. It has become the common practice, in any dispute, to uphold the "rights" of a local citizen, and to drive the stranger out of town. Suppose that, after some thirty years of this practice, a typically unjust decision is made against a wandering cowboy, who is then driven out of town. A newspaperman in a neighboring town writes "Vigilante committee of X-ville is responsible for injustice against cowboy."[38]

It is reasonable to assume that each individual of X-ville or its vigilante committee was implicated in the unjust practice through which the cowboy received rough treatment, because "[e]ach .... would risk ostracization or worse, for himself and his family if he tried to oppose the practice"[39] which had become universal in X-ville. Benjamin argues that for the vigilante committee of X-ville to be held collectively liable for injustice, it would be necessary to find any particular individuals responsible for any unjust treatment the cowboy received. Considering the above circumstances in which each individual of X-ville followed the unjust practice, it is difficult to pinpoint the individual fault that is distributed over X-ville and, Benjamin concludes, the appropriate (moral) blame and punishment should not be visited upon X-ville.[40]

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36 *Ibid.*

37 *Ibid.* at 95.

38 The example of the third type is extracted by Benjamin from D. Cooper, "Responsibility and the System" in P.A. French (ed.), *Individual and Collective Responsibility* (1972, Schenken Publishing Co., Massachusetts), pp. 87-88.

39 Benjamin, *supra* note 34 at 96.

40 Benjamin, *ibid.* at pp. 97-104. For a similar view, see Sullivan, *supra* note 14.

Benjamin's argument is however based upon a *non sequitur*. The fact that the individual fault which is distributed over X-ville is difficult or impossible to identify does not lead to the conclusion that X-ville itself should not be held responsible for its unjust practice. Whether the individual fault can be pinpointed is the basis for its distributiveness of over X-ville, but not for X-ville's responsibility. Since X-ville is blamed for its practice resulting in the unjust treatment against the cowboy, the central issue to its responsibility is not whether the individual fault in relation to the treatment at issue is identifiable or distributed over X-ville, but whether the treatment itself is institutionalised in the practice of X-ville, whether such a practice can be said to cause the undesirable result, and whether it reaches the standards in the administration of justice reached by other towns. Thus, an investigation of whether each individual has fallen below standards which can reasonably be expected of an individual under the circumstances may provide little guidance as to the responsibility of collective entities.

The lesson to be learnt from these examples of collective action and responsibility is that the distribution of a particular individual's fault in a group or organisation is not the prerequisite for the organisation's collective responsibility. As mentioned earlier,[41] each individual in the organisation should be viewed as playing a certain part of the whole practice or system adopted by the organisation. What is necessary for the corporation to be held liable is: (1) the (continued) existence (or lack) of the practice, policy or system which has a causal link with the prohibited consequences; and (2) the fact that the individuals behave in accordance with the system. Therefore, the corporate conduct, for which corporations should be blamed and made culpable, corresponds to the existence (or lack) of a safety systems causally linked to the particular consequences, which needs to be followed by individuals collectively and systematically.[42]

5.4. The Concept of Risk and Corporate Conduct

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41 *Supra* text accompanying note 31.

42 Unlike the corporate policy model examined in the previous chapter, the concept of corporate policy or practice is used here as the basis for corporate conduct governing a company's collective action. How to apply this concept to the requirement of corporate *conduct* required for corporate manslaughter will be presented in the subsequent section.

5.4.1. The Meaning of "Risk"

The conduct in cases of manslaughter is usually expressed in relation to the risk, such as "taking an unjustifiable risk," "failing to avert (or rule out) a risk" or "creating an obvious risk." Namely, the type of conduct necessary for manslaughter is determined by what the defendant did or was expected to do about the risk. For instance, for the individual defendant to be held liable for the new offence of reckless killing under the Law Commission's proposals, two conditions must be met: (1) his/her awareness of a risk that his/her conduct will cause the prohibited result (death or serious injury); and (2) unreasonableness of his/her risk-taking concerning the circumstances as s/he knows or believes them to be.[43] In cases of the new offence of killing by gross carelessness, on the other hand, the following three conditions must be met: (1) the obviousness of the risk to a reasonable person in his/her position; (2) his/her capacity for appreciating the risk at the material time; and (3) either (a) his/her conduct falls below what can reasonably be expected of him/her in the circumstances; or (b) s/he intends by his/her conduct to cause some injury or is aware of, and unreasonably takes, the risk that it may do so.[44] Therefore, in order to establish the type of corporate conduct for manslaughter, it is essential to explore the meaning of risk.

The term "risk" is sometimes replaced with "the possibility of the consequence occurring."[45] The defendant is blamed for running the risk (in cases of positive act) or for permitting the risk to materialise (in cases of omission) unreasonably, despite his/her foresight of the risk of some harm resulting from his/her actions. Whether the risk (or his/her risk-taking action) is reasonable or unreasonable "depends on the social importance of the acts and on the chances of the forbidden consequences occurring."[46]

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43 Law Commission, *Involuntary Manslaughter*, *supra* note 2 at 136 ("Draft of a Bill to create new offences of reckless killing, killing by gross carelessness and corporate killing to replace the offence of manslaughter in cases where death is caused without the intention of causing death or serious injury" [hereinafter cited as *Draft Bill*], Section 1.

44 Law Commission, *Draft Bill*, *ibid*, Section 2.

45 See, for example, C.M.V. Clarkson & H.M. Keating, *Criminal Law - Text and Materials* (1998, 4th ed., Sweet & Maxwell, London), p.156, referring to the Cunningham ([1957] 2 Q.B. 396) or subjective approach to the definition of recklessness.

46 Clarkson & Keating, *ibid.*

In determining the reasonableness of the risk, both a degree of social importance and that of chance of the occurrence of the consequences may be counteractive. That is to say;

> "If the act is one with no social utility, - for example, a game of "Russian roulette" or an armed robbery - the slightest possibility of any harm should be enough. If the act has a high degree of social utility - for example, the performance of a surgical operation - then only such a very high degree of probability of grave harm as outweighs that utility will suffice to condemn it as a reckless act."[47]

When applied to corporate manslaughter cases, the concept of risk has some unique features as to these two factors. The risk is usually consequent upon particular operations run by corporations. In most cases, such operations as construction,[48] canoe or ferry trips or navigation,[49] manufacture or production,[50] running public facilities[51] or driving vehicles,[52] have a very high degree of social utility.[53] Thus, it is unlikely that running these kinds of operations itself is considered unjustifiable or unreasonable. However, it is also inevitable that these operations involve some sources of risk, which may be direct triggers of the cause of harm if mishandled. As described in Chapter 3, the sources of risk can be vehicles, vessels, working places, certain substances, fire or a victim's tendencies regarding his/her behaviour. In cases in which these sources of risk are not managed properly, the likelihood of the occurrence of any harm becomes very high. Furthermore, these operations usually involve corporate workers or

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47 J.C. Smith, *Smith & Hogan Criminal Law* (1996, 8th ed., Butterworths, London), p.64.

48 See cases of Denbo (Chapter 3, text accompanying note 22), Ebasco (Chapter 3, text accompanying note 23), Northern Stripping (Chapter 3, text accompanying note 41), Dye Construction (Chapter 3, text accompanying notes 96-97), British Steel (Chapter 3, text accompanying notes 100-101).

49 See cases of Kite (Chapter 3, text accompanying notes 25-29), Seaboard Offshore (Chapter 3, text accompanying notes 32-33), P & O (Chapter 3, text accompanying notes 72-82), Van Schaik (Chapter 3, text accompanying notes 92-93).

50 See cases of Chicago Magnet (Chapter 3, text accompanying note 31), O'Neil (Chapter 3, text accompanying notes 60-67).

51 See cases of Serebin (Chapter 3, text accompanying notes 43-44), Welansky (Chapter 3, text accompanying notes 47-50), Warner-Lambert (Chapter 3, text accompanying notes 57-58).

52 See cases of Pacific Powder (Chapter 3, text accompanying note 110), McIlwain (Chapter 3, text accompanying notes 116-118), Fortner LP Gas (Chapter 3, text accompanying note 119).

53 See *Law Commission, Involuntary Manslaughter, supra* note 2 at para .8.6, in particular, n.7.

employees, who are in the closest position to the source of risk. Thus, the chances of the occurrence of the consequences may also depend upon whether these corporate employees are properly trained or supervised so as to handle the source of risk.

In determining the possibility of the occurrence of the consequence in cases of corporate manslaughter, the source of risk and corporate employees assume great significance in that they are intermediate factors between corporate conduct and the prohibited consequences. It is not difficult to assume that once a fire breaks out at the building, for example, the likelihood of the occurrence of harm caused by the fire becomes high if an owner of the building has failed to installed fire sprinklers and/or to exercise any fire drill. Similarly, "if a lorry driver employed by a company .... was overtired .... in consequence of a requirement to work excessively long hours ...., and the company had no adequate system of monitoring to ensure that this did not happen",[54] it may be likely that she causes death by dangerous driving in the course of the company's business.

Viewed in this light, how the corporation acted upon the source of risk and/or its employees before the incident or at the material time can shape the degree of corporate culpability. That is, a corporation can be blamed if: (1) any safety measures were not taken by the corporation against the source of risk or the particular operation itself; and/or (2) its employees who were either not properly trained or incapable of handling the source of risk were put in the position close to it.[55] Consider the following two Japanese cases[56] that correspond to (1) and (2) mentioned above respectively.

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54 Law Commission, *Involuntary Manslaughter*, *ibid.* at para. 8.21.

55 (1) is concerned with the company's foresight of causation between the source of risk or the particular operation and the consequence, whilst (2) is with the issue of "acting through an innocent agent." See Law Commission, Law Com. No.177, *A Criminal Code for England and Wales* (1989, HMSO, London) [hereinafter cited as *Criminal Code*], Vol. 2, para. 7.17 ("*Supervening causes*") and paras. 9.10-9.15 respectively.

56 The cases from Japan examined here are cited from *Saiko Saibansho Keiji Hanrei Shu* (A Collection of Criminal Court Cases) [hereinafter cited as "*Saihan Keishu*"] or *Hanrei Jiho* (Case Reports). The name of the case in Japan (or in most civil law jurisdictions) is not usually the title of the case. Cases are generally cited by the number they are given in the particular collection of reports. Unless otherwise stated, Japanese materials including cases are translated from the Japanese into English for use in this thesis.

In the case of Fire Accident in Hotel New Japan,[57] the chief executive officer and manager of a hotel (named "Hotel New Japan") were charged with a crime of "death or bodily injury, etc. caused by negligence in conduct of business" prescribed in Article 211 of the Penal Code of Japan,[58] under the following circumstances.

> In the very early morning of 8 February, 1982, a fire which originated from a hotel guest's smoking in bed (on the eighth floor) flashed out of control and ran over the hotel through the corridors. The hotel, irrespective of having previously received repeated advice and recommendation by the Metropolitan Fire Board, had not installed sprinkler systems or any alternative fire prevention equipment on the fourth, fifth, seventh and ninth floors. Nor had a fire drill been held for hotel employees. As a result of the fire, the death toll reached thirty-three, and twenty-four people were injured.[59]

Suppose that a corporation, instead of or as well as individuals, is charged in these circumstances with an offence of manslaughter by recklessness under the Law

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57 (1987) 1244 *Hanrei Jiho* 36 (Tokyo District Court, 20 May 1987).

58 Law No.45, 24 April 1907 [hereinafter cited as "*Japanese Penal Code*"]. Unlike Article 210 (prescribing a crime of manslaughter caused by negligence in the general sense), Article 211 of Japanese Penal Code, as cited below, adds some special conditions under which the offender is held liable for manslaughter by (gross) negligence: namely, the engagement in, or performance of, profession, occupation or routines [hereinafter cited as "a crime of manslaughter by professional negligence"].

> "A person who fails to take necessary precautions in the conduct of business and thereby causes death or injury to another shall be punished with penal servitude or imprisonment for not more than five years or a fine of not more than five hundred thousand yen. The same shall apply to a person who, by gross negligence causes death or injury to another."

Three points need to be made. First, the concept of "(gross) negligence" (*Fahrläßigkeit*) in both Japan and Germany is slightly different from that used in English law. Considering the lack of direct counterpart of the concept of recklessness in both Japan and Germany, Japanese and German concept of negligence used in criminal law may overlap the scope of both objective (Caldwell) and subjective (Cunningham) recklessness in English criminal law. Secondly, the theory of corporate criminal liability for any crime prescribed in the penal code has strongly been rejected in both Germany and Japan, and actual offenders or top management are instead held liable for the crime of manslaughter by negligence. Thirdly, the term "manslaughter" is used here for the sake of convenience. Yet, there is no distinction between murder and manslaughter in Japanese Penal Code. In cases in which the victim's death is caused by the offender's negligence (in the Japanese sense), the term "negligent homicide" is usually used by both Japanese courts and commentators.

For the theoretical and practical status of corporate liability in Japan, see, for example, N. Kyoto, "Criminal Liability of Corporations - Japan" in H.d. Doelder & K. Tiedemann (eds.), *La Criminalisation du Comportement Collectif* (Criminal Liability of Corporations) (1996, Kluwer Law International, The Hague), pp. 275; G.O.W. Mueller, "Mens Rea and the Corporation: A Study of the Model Penal Code Position on Corporate Criminal Liability" (1957) 19 *University of Pittsburgh Law Review* 21 at pp. 32-33. For the concept of mental states such as intention and negligence used in Japanese criminal law, see S. Dando, *The Criminal Law of Japan: The General Part* (1997, Fred B. Rothman & Co., Colorado), p.155, n.72 and pp. 186-187, n.173.

59 (1987) 1244 *Hanrei Jiho* 36. The defendants were found guilty as charged, and their convictions were affirmed at both the appellate and supreme courts. See (1993) 1481 *Hanrei Jiho* 15.

Commission's proposals. The corporation should be blamed for having failed collectively "to design a fire prevention or fighting plan, to carry out periodic fire drills based on the plan, to check and maintain fire fighting equipment and to operate them effectively in case of fire."[60]

The other Japanese case is concerned with corporate employees' error that caused the consequences. In the case of Kita Gas Carbon Monoxide Poisoning,[61] two part-time workers employed by a gas utility company, its managing director and section chief were held liable for a crime of manslaughter by professional negligence. The facts of this case are as follows.

> On October 1974, the Hokkaido gas utility company was engaged in changing the heat capacity of home gas from 3,600 calories to 5,000 calories. For the heat capacity of home gas to be changed, certain technical adjustments of each home's gas fittings was needed. Because of adjustment errors made by two gas fitters who were employed and sent to each home by the company, carbon monoxide poisoning accidents occurred on sixteen occasions in one month, claiming nine lives and causing injury to twenty-three people. On one of the occasions when carbon monoxide poisoning occurred, a gas fitter was sent to the victim's home by the company. For the change of the heat capacity of a gas geyser installed at the victim's flat, a different type of nozzle pipe needed to be replaced, which he did not prepare at the time when he was engaged in the adjustment operation. He then left the flat with the plan that he would come back to complete the adjustment operation. However, he had so many of the adjustment operations assigned by the company that he forgot the fact that the adjustment operation of the victim's flat was unfinished, and he failed to return there. On 19 October 1974, a huge amount of carbon monoxide gas was emitted from the defective geyser when the resident of the flat switched it on, and two residents in the flat died from carbon monoxide poisoning.[62]

What is interesting to note here is the fault determined by the Sapporo district court on the part of two supervisors (section chief and managing director) of the gas fitters, who were in charge of the adjustment operation plan. According to the court's reasoning, their faults consisted of several failures: (i) a failure to consider each gas fitter's technical ability and the number needed to calculate the appropriate quantity of quotas assigned to them; (ii) a failure to give them sufficient time in advance for an on-the-spot investigation as to what type of instruments would be needed for the adjustment operation; and (iii) a failure to exercise the ex post facto inspection of gas fittings so as

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60 (1987) 1244 *Hanrei Jiho* 36 at pp. 72-74.

61 (1986) 1186 *Hanrei Jiho* 24 (Sapporo District Court, 13 February 1986).

62 *Ibid.* at 28.

to detect and correct any possible adjustment error that might be made by the gas fitter on the previous occasion.[63]

In this case, the source of risk was inherent in the adjustment operation itself. If the gas utility company was charged with the offence of manslaughter by gross carelessness, it might be blamed for its system of plan: (a) which imposed heavy quotas upon each worker and, thus, induced possible adjustment errors by them; and (b) which lacked well-organised preparation for the on-the-spot investigation as to the status of each house's gas fittings and reasonable corrective measures against possible adjustment errors. Although the direct cause of the carbon monoxide poisoning was the gas fitter's elementary error, it is the company that should be blamed for causing the consequences through his mistake.[64]

5.4.2. Risk-Averting Duties and the Type of Corporate Conduct

In the previous subsection, it was revealed that the concept of risk provides the basis for

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63 *Ibid.* at pp. 27-28.

64 Some Japanese commentators characterise the first type of fault (exemplified by the case of Fire Accident in Hotel New Japan) as "structural fault" and the second (represented by the case of Kita Gas Carbon Monoxide Poisoning) as "disastrous fault or disaster-triggering fault." Under the concept of disastrous fault, the company or individual supervisor's fault is considered secondary in that despite the existence of a safety system, a trivial error made by the lower-level employee who fails to follow the relevant operating procedures triggers the catastrophe. The company or individual supervisor's fault is usually identified as a failure properly to train or supervise him before or at the material time of the disaster. On the other hand, under the concept of structural fault, the design error of the relevant operating system or the lack of a safety system is regarded as the direct cause of, or potential for, the consequence. See, for example, H. Itakura, "Kigyo Saigai to Atarashii Keiho Riron (Corporate Disaster and a New Criminal Law Theory)" (1976) 333 *Kenshu* 3. The characteristics of structural fault was referred to by the Japanese court as follows:

> "In cases of structural fault, fault is usually built in the course of large-sized companies' activities. When any fault exists in the corporate managerial decision, the subsequent operations by individuals in accordance with this decision become deficient continuously and repeatedly. It is not rare that immeasurable degree of damage and casualty would occur in such cases."

(1979) 931 *Hanrei Jiho* 6 (Kumamoto District Court, 22 March 1979); (1982) *Hanrei Jiho* 17 (Fukuoka Appellate Court, 6 September 1982) at 21; and (1988) 42 *Saihan Keishu* 314 (the Supreme Court, 29 February 1988) in the case of Kumamoto Minamata Mercury Poisoning Pollution. For the details of this case, see, for example, F.K. Upham, "Litigation and Moral Consciousness in Japan - An Interpretative Analysis for Four Japanese Pollution Suits" (1976) 10 *Law & Society Review* 579; J. Gresser, K. Fujikura & A. Morishima, *Environmental Law in Japan* (1981, the MIT Press, Massachusetts); US Subcommittee on Crime of the Committee of the Judiciary, House of Representatives, 96th Congress, 2nd Session, *Corporate Crime* (1980, US Government Printing Office, Washington), pp. 91-92.

blaming a corporation for its safety system. In particular, the social utility and the chance of the occurrence of the result comprising the meaning of risk are critical factors in determining corporate conduct and culpability.

The concept of risk also provides firm guidance as to what the corporation should do about the risk in cases of manslaughter: namely, risk-averting duties. Legal opinions differ as to whether it is necessary to impose a general duty upon corporations to avert the risk, or it is sufficient to rely upon the well-established common law duty. On the one hand, Clarkson maintains that in cases of corporate omissions, "[the imposition of a general duty upon corporations] seems unnecessary as such companies could almost inevitably be construed as having created a dangerous situation by operating in an unsafe manner, and therefore would be under a common law duty to prevent the dangers materialising."[65] On the other hand, Colvin proposes the imposition of the general duty upon corporations "to guard against their operations causing harm and their structures and resources being used to cause harm."[66]

The mistake that both commentators make is in thinking that the breach of duties to prevent the dangers constitutes only the offence of manslaughter by gross *negligence* (*carelessness*) by *omission*.[67] Clarkson, for example, exemplifies the company's

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[65] Clarkson, *supra* note 17 at 570, citing Miller [1983] 2 A.C. 161, referred to in Chapter 4, n.100. The Miller case includes two different issues here: the source of a legal duty to constitute criminal omissions ("prior dangerous act," Ashworth, *Omissions*, *supra* note 16 at pp. 439-440); and "supervening fault" (Law Commission, *Criminal Code*, *supra* note 55, paras. 8.52-8.55. The former issue is referred to here and in Chapter 4.

[66] Colvin, *Corporate Liability*, *supra* note 28 at 26, asserting the codification of the following provision:

> "A corporation has a duty to avoid or prevent injury to any person, or damage to any thing or place, occurring as a consequence of an undertaking commenced or contemplated by it or of the use of its structures or resources by any person."

Ibid. at n.69.

[67] The difference between omission and negligence should be noted. Whether negligence is a state of mind or an objective failure to comply with standards of a reasonable person for avoiding causing harm to others has been the subject of controversy in common law. See, for example, Clarkson & Keating, *supra* note 45 at pp. 185-187; A. Ashworth, *Principles of Criminal Law* (1995, 2nd ed., Clarendon Press, Oxford) [hereinafter cited as *Principles*], pp. 189-193; E. Colvin, *Principles of Criminal Law* (1991, 2nd ed., A Carswell Publication), pp. 147-150; W.R. LaFave & A.W. Scott, *Substantive Criminal Law* (1986, West Publishing Co., Minnesota), §3.7. Even if negligence is construed as the failure to comply with a standard of behaviour objectively assessed, it is for the offender's failure to exercise due care that she is blamed. Thus, "she cannot be punished for this failure if the risk in question would never have been apparent to her, no matter

positive acts as "pumping effluent into a river" and omissions to act as "failing to implement a safety system" respectively.[68] It may be reasonable to assume that in Clarkson's mind, the term "failing to" do something may fit the form of omission. The company's failure to implement a safety system, however, could also be construed as positive acts. In Clarkson's hypothetical example of omissions, the possible victims of the company's lack of a safety system are workers and customers.[69] In both cases, the company can be said to continue its operation through its workers and expose them to the risk, and to invite the customers to a place (such as a ferry) without a safety system. Given that the lack of a safety system itself does not create any risk to the victim, it may be more appropriate to pay attention to the company's continuance of the operation in question or its invitation of the victim than to its lack of a safety system.[70]

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how hard she thought about the potential consequences of her conduct. If this criterion is not insisted upon, the accused will, in essence, be punished for being less intelligent, mature or capable than the average person." Law Commission, *Involuntary Manslaughter*, *supra* note 2, para.4.20.

The offender may fail to exercise due care concerning the risk either (1) during her actions or (2) after the risk which she was capable of perceiving is already under way. Whilst negligence is committed by her positive act in case (1), it is by her omission in case (2). On the other hand, the omission is part of conduct, so that the offender can intentionally, recklessly or even negligently omit to do the required acts.

The marked overlap between omission and negligence may be found in the case where the offender fails to perceive the ongoing risk which she has a legal duty to stop. Nevertheless, both can be distinguished in terms of two different legal duties she owes to the victim concerning the risk: a duty to perceive the ongoing risk of harm to the victim and a duty to prevent the ongoing from causing harm to the victim. As will be discussed later, the discharge of the latter duty is premised upon that of the former. In cases of corporate offenders, it has been considered that they are incapable of perceiving the risk (*supra* text accompanying notes 13), so that both concepts have been erroneously confused when applied to corporations.

68 Clarkson, *supra* note 17 at 570.

69 As for the former, the Law Commission examines several cases in which a common law duty is imposed upon an employer to take care for the safety of employees, in particular, to provide a safe system of work. Law Commission, *Involuntary Manslaughter*, *supra* note 2 at para.8.10-8.34. With regard to the latter, the best example is the P & O case in which numerous passengers were drowned.

70 The offences of omission is classified by Ashworth into three groups: (1) offences of failing to do certain required acts; (2) hybrid act-omission offences; and (3) offences phrased in terms of acts, for which omissions may suffice. Ashworth, *Omissions*, *supra* note 16 at 433. Ashworth attaches importance to the third group in cases of individuals, in his attempt to analyse certain offences that cannot be committed by omission. *Ibid.* at 434.

In cases of corporate manslaughter, on the other hand, the second group may be of great significance, rather than the first and third groups. The first group is based on the existence of a duty to do certain acts required by law (for example, the establishment of a safety system), but the very reason for the imposition of such a duty in the context of corporations consists in the subsequent corporate actions, such as the invitation of customers to certain areas or places in which

By contrast, the risk of harm to victims may occur after the company invites them. In the case of Fire Accident in Hotel New Japan,[71] a fire occurred after the company's lack of a safety system and its invitation of guests. The fire was not caused by any fault on the part of the company, so that the finding of the company's fault needed to be retroactive to the lack of a safety system (omissions) before the incidents.

The main point at issue is that neither the creation of a general duty nor the use of the existing common law duty provide any solution to distinguish between corporate positive acts and corporate omissions. As Ashworth observes, "we owe [both] negative duties (*e.g.* not to kill or injure).... [and] positive duties (*e.g.* to render assistance, to support)...."[72] Despite the difference between the two concerning the scope of victims (namely, whilst in the former "all people," in the latter "a special circumscribed group of people with whom there exists a special relationship"[73]), the emphasis on the aspect of breach of duty in cases of corporate manslaughter would make little or no difference between corporate positive acts and corporate omissions. Since the victim to whom the corporation owes a duty to prevent the risk may range from its workers and customers to the general public,[74] any effort to limit the scope of victims of the company's lack of safety system is unnecessary to clarify the type of corporate conduct.[75]

All things considered, the source of a duty to prevent the risk (namely, a common law duty or not) is not so significant as to determine the type of corporate conduct. As Ashworth has argued,

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the company's failure in the duty is prevailing.

71 *Supra* text accompanying note 59.

72 Ashworth, *Omissions*, *supra* note 16 at 424.

73 *Ibid.* at pp. 424-425.

74 See Chapter 3, text accompanying note 24.

75 The reason why the scope of victims seems limited in cases of corporate manslaughter may lie in the commentators and courts' special attention to the relationship between the particular corporate operation containing or producing the risk and the potential victims involved in it (such as workers). Yet, this relationship should obviously be considered in relation to the issues of causation and foresight of the consequences. Thus, the company's breach of duty either to prevent the risk or to implement a safety system is not always limited to the cases of gross negligence (carelessness) or omissions. *Supra* note 67.

> "Some corporations operate in spheres of such potential social danger, and wield such power (in terms of economic resources and influence), that there is no social unfairness in holding them to higher standards than individuals when it comes to criminal liability, so long as fair warning is given. This is particularly so when they engage in commercial activities in spheres where public safety may be at risk. The same cannot be said of individuals.... Thus the conflict between social welfare and fairness to defendants should be resolved differently according to whether the defendant is a private individual or a large corporation."[76]

Given that material, financial and technical resources are usually available to corporations to take risk-averting actions, higher standards of care should be expected of them than individuals. It is for this reason that legal duties to avert the risk resulting from the relevant corporate activity should be imposed upon corporations.[77]

As for the type of corporate conduct in cases of manslaughter, balance considerations between the social utility and the probability of the occurrence of harm[78]

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[76] Ashworth, *Principles*, *supra* note 67 at p. 161. See also Colvin, *Corporate Liability*, *supra* note 28 at 27; Fisse & Braithwaite, *supra* note 29 at pp. 29-30.

[77] The standard of care is, of course, also determined according to the status of the defendant. Parents incur an *overall* legal duty to take care of their child against *any* risk. But a corporation, as an employer of its workers, owner of facilities or buildings, or guarantor of its products, is responsible for the safety of its working place, facilities or products to the victims. Thus, it is not the company's fault if one of the hotel's guests dies of hunger during his stay at the hotel.

Schünemann has submitted three grounds for the imposition of a legal duty upon employers for criminal omissions in the context of corporate activities: (1) the relationship between an employer's (legal) power to order (*rechtliche Befehlsgewalt*) and the employees' obedience; (2) the amount of the relevant information (*überlegenen Informationsfundus*) and knowledge (*Herrschaftswissen*) possessed by the employer superior to employees; and (3) the virtual accomplishability (*faktische Durchsetzbarkeit*) of the employer's order to employees, which is similarly found in the case of the offender's use of an innocent agent. B. Schünemann, *Unternehmenskriminalität und Strafrecht* (1979, Carl Heymanns Verlag KG, Cologne), pp. 97-102. According to Schünemann, the employer who locates the top of the corporate hierarchy usually has indirect control over the source of risk through his employees, who are in the nearest position to it. Thus, the employer's duty to avert the risk inherent in the corporate operation is determined according to the extent to which he performs a duty to supervise his employees directly or a duty to organise the delegation system of supervision. *Ibid.* at pp. 95-98.

The term "to control the source of risk" used in this thesis mainly comes from this book ("*Oberherrsschaft über gefährliche Sachen* ["control over dangerous things"]). Schünemann's main concern in this book is how to hold the *individual* employer liable for *omissions* in the corporate hierarchy. Nevertheless, as mentioned earlier (*supra* text accompanying notes 67-75), the employer's failure to control the (source of) risk is not always limited to the offence of omissions. Furthermore, it should be borne in mind that corporate *criminal* liability is not accepted in German criminal law, so that it is inevitable that Schünemann's main target of criminal liability is directed at the individual. For the useful work on the issue of criminal omissions in German criminal law, see, for example, G.P. Fletcher, "Criminal Omissions: Some Perspectives" (1976) 24 *American Journal of Comparative Law* 703.

[78] *Supra* text accompanying notes 46-54.

may play a critical role in distinguishing between corporate positive acts and corporate omissions. Since the harm-causing conduct in reckless manslaughter is shaped by such balance considerations, a distinction between corporate positive acts and corporate omissions should be drawn according to (1) when the risk involved in the particular operations or in the source of risk materialises; and (2) whether the company's conduct at the material time still has a certain degree of social utility that is tolerated by law. Consider the P & O case in chronological order. The lack of a safety system, which was caused by the disease of sloppiness infecting the company,[79] preceded the company's invitation to the prospective victims (= passengers) of the ferry trip. As mentioned earlier,[80] however, the lack of a safety system itself did not create any risk of harm to the victims before the company actually invited them on board. At the time when the company did invite them and the ferry sailed, there was no or little chance left to the company to prevent the risk from materialising. Under the circumstances, it is difficult to find any social importance to the company's invitation to the victims of the ferry trip, so that the causal link should be determined between the victims' deaths and the company's invitation.

As compared to the P & O case, the case of Fire Accident in Hotel New Japan leads to a different conclusion. When the hotel invited the guests to stay in the hotel, there already existed the lack of a safety system. But the cause of a fire was one of the guests' smoking in bed after the hotel's invitation of guests, so that no risk of harm was created by the hotel's lack of a safety system or by its invitation prior to the occurrence of the fire at issue. That is, at the time of the hotel's invitation, there existed a certain degree of social utility on the part of the hotel. Therefore, it is not the hotel's invitation (positive acts), but its lack of a safety system (omissions) that should be causally linked with the victims' deaths.[81]

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79 *Sheen Report*, cited in Chapter 3, n.77.

80 *Supra* text accompanying note 70.

81 However, there may exist certain situations in which it is appropriate to regard the hotel's invitation of guests as positive acts. Assume that a time bomb was planted by a terrorist group at the hotel, and a bombshell statement was mailed. But the hotel ignored the warning and continued inviting guests thereafter. Under these circumstances, since the hotel was aware of the probable and substantial risk of harm, the subsequent invitation of the guests to the hotel could

5.5. Corporate Mental States and the Scope of Risk-Averting Duties

5.5.1. Corporate Mental States

In examining the relationship between the meaning of risk and corporate conduct, the previous section concluded that the risk-averting duties result from the fact that the corporation engages in the particular risk-involving operation and has enormous resources to take risk-averting actions. It was also suggested that the type of corporate conduct should be determined by balance considerations between the social utility and the probability of the occurrence of actual harm. The final issue is how to construct corporate recklessness and gross carelessness for the offence of manslaughter. To address this issue, it is first necessary to summarise the Law Commission's proposals for both an offence of reckless manslaughter and that of manslaughter by gross carelessness, which are considered capable of the commission only by individuals.

In short, an individual offender is held liable under the Law Commission's proposals for reckless manslaughter when s/he took the risk unreasonably despite his/her awareness of it. In the case of manslaughter by gross carelessness, s/he is held liable when s/he failed to perceive but took the risk obvious to a reasonable person, despite his/her capacity for the appreciation of it. Roughly speaking, the offence of reckless manslaughter corresponds to his/her breach of duty to avert the risk, while the offence of manslaughter by gross carelessness corresponds to his/her breach of duty to perceive the risk.[82] Because it is difficult to assume that s/he could be expected to avert the risk

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be considered positive acts that created the risk of harm to the guests, who were invited after the hotel's awareness of the risk.

82 Since Adomako ([1994] 2 All ER 79), the Caldwell ([1982] A.C. 341) recklessness definition (or objective recklessness) is no longer applicable to manslaughter. See Ashworth, *Principles*, *supra* note 67 at p. 183. Thus, the term "recklessness" referred to here means advertent or subjective recklessness. Any substantial overlap between (gross) negligence and Caldwell reckless concerning the defendant's failure to give his mind to the possibility of a risk or his erroneous judgment of the existence of a risk is treated as part of (gross) negligence thereinafter. For a distinction between the two, see, for example, Clarkson & Keating, *supra* note 45 at pp. 174-175.

The type of fault is best explained by P. Murphy (ed.), *Blackstone's Criminal Practice* (1997, 7th ed., Blackstone Press Ltd., London), p.20, as follows: Consequence (a) desired (intention); (b) foreseen as virtually certain (intention *may* be inferred); (c) foreseen as probable or (d) possible (typically subjective recklessness); (e) not foreseen but ought to have been (negligence or objective recklessness); and (f) even reasonable man would not foresee (strict liability). The term "consequence", of course, includes circumstances. See Smith, *supra* note 47

without his/her awareness of it, a duty to perceive the risk should be considered to be part of a duty to avert the risk. In other words, s/he is held liable for manslaughter by gross carelessness when s/he failed to discharge the *initial* part of the duty to avert the risk, whilst s/he is liable for reckless manslaughter when s/he, based upon his/her awareness of the risk, subsequently continued his/her risk-causing conduct (in case of positive acts) or failed to prevent the pre-existing risk from causing the prohibited result (in case of omissions).

In addressing the issue of foreseeability of the risk in Japanese criminal law, Hiroshi Ōtsuka has provided an interesting analysis of the process of the individual's perception of the risk.[83] In order for corporate mental states to be established based on an analogy with individual mental states, it may be useful next to refer to his work. According to Ōtsuka, the individual offender's failure to perceive the risk or lack of due care in cases of gross carelessness may be divided into the following three groups: (1) s/he does not pay attention to collecting any information in relation to the risk; (2) s/he does collect the relevant information to the risk, but fails to concentrate on analysing it so as to conclude the possibility of the existence of the risk (*e.g.* because of his/her preoccupation with something else); and (3) s/he collects information relevant to the risk, pays attention to it, but misjudges it so as to conclude the existence of the risk.[84] The first category can be characterised as his/her failure to use his/her sensory organs to respond to stimuli from the outer world (collection errors). In the second category,

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at pp. 72-73.

83 H. Ōtsuka, "Yoken-Kanōsei no Handan-Kōzō to Kanri-Kantoku Kashitsu (Structural Judgments on the Issue of Foreseeability and Supervisory Fault)" (1997) 36 *Keiho Zasshi* 359 at pp. 366-367. Ōtsuka's purpose is to use subjective (an offender) and objective (a reasonable person) standards properly to determine the foreseeability of the risk, in terms of analysing the process of the individual's perception of the risk in chronological order. The main target of the imposition of liability for negligence under Ōtsuka's approach is, of course, an individual offender. The new approach suggested here is an applied version of Ōtsuka's biological analysis of human perception of stimuli from the outer world to corporations.

84 Several commentators view this third category as distinguishing between negligence and Caldwell recklessness. See, for example, Clarkson & Keating, *supra* note 45 at p.165; R. Card, *Card, Cross & Jones Criminal Law* (14th ed., Butterworths, London), p.76; Smith, *supra* note 47 at p.72. On the other hand, the second case seems similar to Caldwell recklessness, but still requires, not the objective standard, but the offender's capacity for appreciating the risk, based on the assumption that s/he would have appreciated the risk if s/he concentrated on analysing the relevant information.

his/her sensory organs actually respond to stimuli from the outer world, but his/her brain refuses their transmission (transaction errors). In the third category, his/her brain fails properly to judge the information transmitted by sensory organs, so that it cannot send back subsequent orders to take risk-averting (in)actions (judgment errors).

In cases of reckless manslaughter, his/her sensory organs respond successfully to stimuli from the outer world (1), and transmit them to his/her brain (2) in which positive judgments as to the existence of the risk are made (3). The critical points for his/her recklessness consist in his/her brain's incorrect assessments as to the probability of the potential harm, which affect his/her subsequent (in)action (assessment errors). His/her incorrect assessments may be based on (4) the underestimation of the scale or extent of the risk involved; and/or (5) erroneous reliance upon, or the overestimation of, the feasibility or effectiveness of his/her risk-averting (or risk-minimising) skills to prevent the prohibited result.[85]

The subject matter here is how to apply these observations of human risk-perceiving process to corporate offenders. Since a corporation is a fictitious entity, it is not realistic to assume that it uses its own sensory organs to respond to stimuli from the outer world.[86] In relation to collection errors, it is thus inevitable to rely upon any

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[85] Some may argue that subjective recklessness should be reconsidered in a way that an offender makes a *correct* assessment of the risk, coupled with *indifference* as to whether the prohibited result occurs. See, for example, R.A. Duff, *Intention, Agency and Criminal Liability* (1990, Blackwell, Oxford), pp. 162-164, referred to in C. Wells, "Corporations: Culture, Risk and Criminal Liability" [1993] *Criminal Law Review* 551 at pp. 562-563. However, as Smith points out (*supra* note 47 at pp. 71-72), whether s/he is indifferent to the risk or the prohibited result can be known only by reference to evidence as to his/her "general character and habits the law of evidence does not allow. It is submitted that indifference to a particular risk, where it is proved to exist, is an aggravating factor, but not an element in the definition of the required fault." [Footnote omitted] See also Card, *supra* note 84 at para. 3.47. (stating that "[a] person who consciously takes an unjustified risk which he hopes will not materialise is generally also subjectively reckless." [Footnote omitted]). In this thesis' position, thus, central to determining the existence of recklessness on the part of the offender is not whether s/he is indifferent to the risk or the prohibited result, but how s/he assesses the risk.

[86] Based on Dan-Cohen's concept of "personless corporations" (M. Dan-Cohen, *Rights, Persons, and Organizations - A Legal Theory for Bureaucratic Society* (1986, University of California Press, Berkeley), ch.3), Sullivan provides an interesting example to describe an "inherently corporate mental state." See Sullivan, *supra* note 14 at pp. 536-537.

> "The claim that there can be an inherently corporate mental state is made most starkly if we take company X to be one of Dan-Cohen's personless corporations, a company of some future time which can come into legal being, all legal formalities satisfied, as an artificial intelligence system operated by robots. Once the system is set up, it manufactures products,

corporate personnel's sensory organs to determine whether the corporation pays attention to collecting any information in relation to the risk involved in its operation.[87] Under the new approach here, however, no particular individual's failure to perceive the obvious risk is imputed to the corporation. Rather, the first type of corporate gross carelessness may be found if the corporation fails to establish any effective systems which enable its personnel to collect information relevant to the risk. This type of corporate fault may be proved by evidence that the defendant corporation places an

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takes and executes orders and so forth without any further human intervention. Because of the sophistication of its programme, company X can respond to the fact that a particular country may not lawfully acquire its products by creating false certification, arranging intermediate destinations for its shipment in order to continue trading with that country. Assume that no human individual, past or present, is in any way at fault for the fact that company X is trading and will continue to trade with a proscribed country: if there is any knowledge present here at all, it can only be the knowledge of company X."

In this hypothetical example, it would be possible to regard company X's sophisticated programme as the authentic equivalent of human mental faculties. Yet, it would also be difficult to justify any legal reason to treat company X as a *legal* or *juristic* person, rather than as a mere factory, mainly because a corporation is a *legal* person created by law "as a short hand or algebraic expression for the determination of the relative claims and obligations of individuals engaged in a joint enterprise." Francis, *supra* note 16 at 307. In short, if no individual is involved, there are no claims and obligations for law to deal with. On the purpose of forming an association or corporation, see also G.F. Canfield, "Corporate Responsibility for Crime" (1914) 14 *Columbia Law Review* 469 at 469 ("When two or more persons agree to act together in association for any purpose, they think of the association as something different from themselves, and they think of the acts done in the name and on behalf of the association as acts of the association considered as a separate individual, rather than as the acts of themselves as joint parties in interest.... [I]t is obvious that, in general, you can best give effect to the intentions of these persons and so decide justly questions involving the rights and liabilities growing out of associate action, if you treat the association as if it were an individual or legal person having the same capacity for rights and liabilities as a natural person possesses."); E. Hacker, "The Penal Ability and Responsibility of the Corporate Bodies" (1924) 14 *Journal of American Institute of Criminal Law & Criminology* 91 at 91 ("The social, political, mental and economic power and value of the human race increases enormously by organizing. That which one man when alone cannot even dream of realizing becomes possible when allied with others.... The duration of the life of one individual is too short for realizing such purposes").

87 The new approach suggested here is relatively similar to a "brain-hand" or "brain-nerve" analogy between human and corporate bodies expressed in the Bolton case (Chapter 2, text accompanying note 168). The main difference between the two is concerned with how to treat each individual in the corporate hierarchy. In the former analogical approach, on the one hand, only the acts and mental states of corporate "brains" (= controlling officers) become the target for identifying those of the company, so that any other "hands" are eliminated from any consideration. This is also true of the vicarious liability doctrine, since any other individuals than an actual offender are usually regarded as irrelevant to the liability of the corporation. On the other hand, under the new approach, each individual is deemed to play a certain role in the whole system of the corporation (*supra* text accompanying notes 30-33), in order to determine whether or not the company takes *collective* actions to avert the risk at issue. Thus, even if the particular individual, whether a controlling officer or lower-level employee, has the requisite conduct and mental states, his/her conduct and mental states are not automatically imputed to the corporation. The difference between the new approach and the aggregation theory will be referred to in the next section.

unskilful or unsupervised individual, who is in the closest position to the source of risk or engages him/her in the particular corporate operation that needs professional skills. In these circumstance, such an individual is obviously incapable both of completing the task assigned by the corporation and of appreciating any risk involved in the operation. Yet, the risk at issue can be perceived by *the corporation* if it: (i) gave him/her proper training prior to the occurrence of harm; (ii) rendered his/her work supervised by experienced superiors at the material time; or (iii) assigned the task to a more capable worker.[88]

With regard to transaction errors, it is first necessary to regard corporate decision-making officials (= controlling officers) as corporate "brains," as formulated in the Bolton case.[89] Since these figures are usually so remote from the corporation's day-to-day operations involving the risk of harm that it is most unlikely that they directly

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[88] In the Ebasco case (Chapter 3, text accompanying note 23), it was held that the company failed "to properly construct and supervise construction of a cofferdam," and failed "to perceive a substantial and unjustifiable risk of death in the construction of cofferdam, in a manner which constituted a gross deviation from the standard of care that a reasonable person would observe in the situation." The fieldwork was under the supervision of several corporate officers, so that their failure to perceive the risk was obviously imputed to the corporation. The critical difference between this vicarious liability approach and the corporate collection errors proposed here is that, in the former, individuals in question were capable of perceiving the risk whilst the latter approach is applicable to the case in which the individuals in question were incapable of appreciating the risk and their work were unsupervised at the material time. Such fault of the corporation can be equated with the corporation's failure to make positive efforts to collect the information of the risk which would result from the individual's probable errors.

The applicable cases of corporate collection errors may be Seaboard Offshore (Chapter 3, text accompanying notes 32-33, in which the defendant company allowed the chief engineer insufficient time to familiarise himself with the ship before it sailed, so that his subsequent technical errors caused the ship to stop and to remain drifting in the North Sea), Northern Stripping Mining (Chapter 3, text accompanying note 41, in which an inexperienced foreman was assigned to the operation of demolishing the railway bridge and, accordingly, his misunderstanding of oral instructions given by the defendant company's managing director caused the subsequent death of the victim), and British Steel (Chapter 3, text accompanying notes 100-101, in which the repositioning operation was not supervised by the section engineer of the company who thus failed to detect that essential safeguards were not being followed at the material time).

[89] *Supra* note 87. Corporate "brains" proposed here are similar to the term "controlling officers" used under the identification principle. It should be noticed here, however, that corporate "brains" used under the proposal mean those who are in the position to make decisions (in particular, financial decisions) as to necessary risk-averting actions. In the case of a fire accident at the building or hotel, for example, those who could make decisions, in their directorial capacity, to install expensive fire equipment or exercise a fire drill collectively, may fall into this category. If s/he does not affect relevant corporate decisions as to necessary risk-averting actions, s/he will not be considered part of "brains," no matter high his/her position is in the corporate hierarchy.

collect the relevant information of the possible occurrence of the risk. The most probable individuals in the corporate hierarchy who collect the relevant information to the risk are: (i) the lower-level employees who are in the closest position to the source of risk; or (ii) their immediate supervisors (middle management). When the risk of harm is involved in the particular corporate operation, any necessary preventive actions to avert the risk should be taken in terms of decisions by corporate "brains." The point is that those who actually appreciate the possible occurrence of the risk and those who subsequently make decisions as to risk-averting actions are different in cases of corporate manslaughter.[90] For the subsequent risk-averting actions to be taken, it is vital for the corporation to establish the communication system (or "central nervous system") between lower or middle-level employees and the top management, which enables smooth and prompt transactions of the relevant information to the risk.[91] Therefore, under the proposed transaction errors, corporate gross carelessness may also be found in cases in which the relevant information to the risk possessed by employees fails to

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[90] Corporate gross carelessness based on transaction errors proposed here can overcome some difficulty the identification principle suffers, which has acutely been described by Fisse as follows:

> "Not surprisingly, the [identification] principle has often been watered down to cover middle managers in the absence of any finding that they have been delegated an unfettered power by the board. This dilution of the [identification] principle is readily understandable but no clear criteria have emerged for deciding whether a representative of a company has the requisite corporate manna. The reason is not difficult to understand. In a corporate world of diffuse organisational responsibilities many employees have an input in management and the people at the top of an organisational hierarchy are often remote from the day-to-day sources of operational power. This invites the conclusion that there is little future in trying to define the personal identity of a company." [Footnotes omitted].

Fisse, *supra* note 4 at 601. See also Chapter 3, text accompanying notes 58-59. Under the new approach, if it is proved that the top management of the corporation responsible for corporate policies and decisions concerning risk-averting actions ignored or did not know any message of the existence of the risk sent from the middle management, the corporate defendant would be considered to fail to give thought to whether there was a risk which was capable of appreciation by it.

[91] As found in examining the Warner-Lambert case (Chapter 3, text accompanying notes 57-59), the identification principle suffers the dilemma that top officers are usually remote from specific corporate operations but have sufficient authority to implement a risk-averting policy whilst the lower-level workers do have the technical expertise of the operations at issue, but lack the authority to do so. The other possible solution to this dilemma is to extend the scope of identification to the middle management, as found in the Meridian case (Chapter 2, text accompanying notes 216-220). However, if those who perceived the risk failed to report upon the existence of the risk to the top management, so that the top management had no chance to take risk-averting actions, the corporation's fault would be neither their failure to report nor top management's failure to take risk-averting actions, but *its own* failure properly to instruct employees so as to inform the top management of the existence of the risk prior to the occurrence of harm. Such a corporate failure can be inferred from the lack of the communication system.

transmit to the decision-making officers due to the lack of effective communication system.[92]

Furthermore, for the corporate judgment errors to be found, it is necessary to prove that the corporation does not make either collection or transaction errors described above: namely, (1) those who are assigned the risk-involving task are so properly trained or supervised as to perceive the risk at issue (the absence of collection errors); and (2) the corporation establishes the appropriate communication system between the top management and them, through which they actually inform the top management of the existence of the risk involved in their operation (the absence of transaction errors). The corporation's judgment errors are, then, to be made by its top management who fail to take their inferior employees' information seriously and wrongfully rule the existence of the risk out. In this situation, the corporation can properly be said to "[stop] to think whether there is a risk, [conclude] there is no risk and consequently [act]."[93]

The most applicable case to this type of corporate gross carelessness, if not perfectly, may be the Kite case.[94] In this case, the managing director of the activity company himself created an unjustifiable risk by failing properly to train his instructors (collection errors) and to maintain a safe system for the execution of an outdoor leisure

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92 Any controlling officer's lack of the relevant knowledge to the risk, the lack of any safety measures that should have been taken against the risk, and the risk at issue which would be obvious to a reasonable person or was in fact perceived by employees would suffice for proof of the corporation's transaction errors.

93 Clarkson & Keating, *supra* note 45 at p.165. See also *supra* note 82. As a matter of evidence, a distinction between corporate judgment errors and corporate assessment errors (namely, corporate gross carelessness and corporate recklessness) may be difficult to draw. It is critical to examine whether corporate "brains" actually believed the existence of the risk involved in the particular corporate operation in terms of the information transmitted by their inferior employees. If they decided to ignore their inferiors' advice as to the existence of the risk, such ignorance would be considered judgment errors on the existence of the risk. On the other hand, if they acknowledged the existence of the risk but underestimated the extent of the risk, then such an attitude would be viewed as assessment errors on (or indifference to) the risk of harm. To draw a clear line between "ignorance" and "underestimation" regarding the risk, it may be preferable to incorporate the concept of notification from authorities concerned, advocated in the reactive fault model (Chapter 4, text accompanying note 68). Once the corporation receives court orders or notices issued administratively by an enforcement agency as to the existence of the risk involved in the particular corporate operation, it will be easy to deny that the corporation rules the risk out (namely, corporate judgment errors).

94 Chapter 3, text accompanying notes 25-29.

activity. He also failed to establish liaison between management and staff (transaction errors). Nevertheless, he received a warning letter from ex-instructors, which informed him of the probable occurrence of the risk of harm to customers (= students). Thus, this case would provide an example for the corporate judgment errors that were made by the managing director, who failed to heed the warning from the ex-instructors and continued the outdoor leisure activities without a safe system.

With respect to corporate recklessness, corporate assessment errors need to be proved as to the probability of the occurrence of the risk. As mentioned earlier, such assessment errors made by the offender's brain may be based on the underestimation of the extent of the risk and/or on the overestimation of his risk-averting skills to prevent the prohibited result. The former type of assessment errors are more likely to occur to corporate "brains" than the second type for two reasons. Firstly, corporate operations involving the risk of harm, such as transportation, production or construction, usually have a very high degree of social utility, so that the top management of the corporation may be apt to decide the continuance of the operation at issue without the implementation of any necessary risk-averting actions. Secondly, the implementation of safety systems or risk-averting actions usually makes less contribution to the main purpose of corporate business, namely, profit-maximisation, than the operation at issue. Thus, unless they are keenly informed by employees of the high probability of the occurrence of the risk or the ongoing risk of actual harm, they may be apt to underrate the scale of the risk.

Examples of corporate assessment errors based on the underestimation of the extent of the risk are easily found. In the Serebin case,[95] the nursing home administrator was repeatedly warned by his staff and state officials that insufficient staffing had created an unjustifiable risk to the patients, but continued to admit more patients and reduce the nursing staff further. He was so concerned about how to operate the nursing home within the budget that he took no alternative safety actions, such as proper training of the staff as to a closer bed check or the installation of alarms on doors to inform the staff of the occurrence of the patients' walking out of the building. Furthermore, in the

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[95] Chapter 3, text accompanying notes 43-46.

P & O case, the directors of the corporation were informed of previous open-door incidents and received the recommendation from the ship masters that warning lights be installed for the ferry's captain to ensure that doors were closed. However, they did not take the recommendation seriously, perhaps because the capsize did not happen on the previous occasions when the ferries sailed with their bow doors open (the underestimation of the scale of the risk).[96] Or suppose that in the cases of Denbo, McIlwain School Bus and Fortner LP Gas,[97] the controlling officers of the corporation were informed and recommended by drivers that some parts of their vehicles had been so defective that they would need repairs. Again, suppose that because of the cost of the necessary repairs and the number of vehicles, the corporate "brains" ignored the situation which involved a high probability of the risk of harm to drivers and pedestrians. Such a cost-benefit analysis may well prove that it was *unreasonable* to take the risk at issue.[98]

On the other hand, the second type of assessment errors as to the probability of the occurrence of the risk may occur if the corporation already implements a safety system in general. Nevertheless, the corporation can be blamed for its top management's assessment errors if, at the material time of the occurrence of the risk, the

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96 Sullivan has suggested that an inexpensive electrical device (warning lights) was available at the time of the tragedy, but not widely used in the British ferry industry, so that the failure to install such a device could not be regarded as conduct falling far below the standard that could reasonably have been expected from P & O in the circumstances. Sullivan, *supra* note 14 at 542.

However, the issue of what kinds of actions were needed to avert the risk is usually determined by the type of risk created by the defendant. Thus, whether or not conduct fell far below the standard that could reasonably have been expected from the defendant in the circumstances is not determined by the fact that the type of risk-averting actions was widely accepted or popular in the industry, but by the type of the risk itself created by the defendant. It is certain that if warning lights were too costly for P & O to install, such unavailability of the necessary risk-averting actions could be a defence. But it is also certain that sailing the ferry with its bow doors open was not a "widely" accepted manner in the British ferry industry even at the time of the tragedy.

97 Chapter 3, text accompanying notes 22, 116-118 and 119 respectively.

98 See also State v. Ford Motors Co in M.B. Clinard & P.C. Yeager, *Corporate Crime* (1980, The Free Press, New York); F.T. Cullen, W.J. Maakestad & G. Cavender, *Corporate Crime under Attack* (1987, Anderson Publishing Co., Ohio); D.J. Miester, "Criminal Liability for Corporations that Kill" (1990) 64 *Tulane Law Review* 919 at pp. 927-929 (in which Ford expected that the costs of adding the safety bladder for 12.5 million vehicles ("Pinto"), whose gas tank was defective, would be 137 million whilst the total costs of settling with the victims of these vehicles (dead or injured) would be $48 million, and, thus, decided to release the Pinto onto the market without the safety bladder).

safety system does not work sufficiently to prevent the casualties, which could be avoided if the safety system was properly maintained and monitored on a regular basis. The typical example of this type of assessment errors is the Warner-Lambert case. Several officers were informed by the insurance carrier that the dust condition in the corporation's factory had created an explosion hazard, so that they made proposals for altering the duct condition. Before the proposals were fully implemented, however, they allowed the manufacturing operation of the product at issue to resume and, as a result, the catastrophic explosion occurred.

5.5.2. The Scope of Risk-Averting Duties

The corporate mental states described in the previous subsection are established by addressing the issue of what the corporation is expected to do concerning the risk involved in the particular corporate operation. As mentioned earlier,[99] blame should be attached to a corporation when it fails to implement a safety system to prevent the source of risk from causing harm, and/or to train and supervise individuals who are in the closest position to the source of risk. Corporate risk-averting duties are thus, concerned with both the establishment of a safety system and proper supervision of corporate personnel. For the scope of risk-averting duties to be clarified in relation to corporate mental states, it may be first useful to refer to an interesting classification of risk-averting duties that has been made by Ishizuka. According to Ishizuka, risk-averting duties consist of:

> "1. a duty to instruct or train employees not to make any mistakes resulting in casualties during the course of daily operations;
>
> 2. a duty to establish particular systems designed to prevent the employees' mistake (for example, in some work places, to colour connecting lines so as to prevent connection error between machines);
>
> 3. a duty to establish a system whereby even if an employee does make some mistake, that mistake will not give rise to a dangerous result (for example, to install an alarm device or fire prevention equipment);
>
> 4. a duty to ascertain whether each employee behaves in accordance with systems established; and

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[99] *Supra* text accompanying notes 28-33.

5. a duty to ascertain how the established systems operate." [100]

The structure of risk-averting duties described above is well-organised in the sense that any possible and effective actions required to prevent the occurrence of the risk of harm are combined in chronological order. The initial and elementary step to avert the risk is to supervise the lower-level employees, who are most likely to trigger the cause of the prohibited consequences through their mishandling of the source of risk ("1"). Furthermore, for the catastrophic consequences to be avoided, it would be effective not only to supervise them directly, but also to contrive some device or plan useful to prevent their mistake ("2").[101] Yet, since human errors inevitably occur no matter how diligently employees are trained and supervised, double check systems need to be implemented to prevent such errors from causing the prohibited result ("3"). Finally, in order for these risk-averting systems to operate effectively at the material time, periodic inspections as to the qualifications and adequacy of each employee and the established systems should be required ("4" and "5").

Originally, Ishizuka has advocated that the above risk-averting duties should be imposed upon supervisory individuals who are sufficiently high in the corporate hierarchy.[102] In addition, the issue of whether those supervisory individuals properly discharged the risk-averting duty is addressed under the Japanese criminal law only after it is proved that they actually perceived the risk or that the risk at issue was foreseeable.[103] Therefore, when applied to corporate offenders, the model of risk-averting duties submitted by Ishizuka should be considered in relation to each type of corporate errors described in the previous subsection.

The first component of corporate risk-averting duties is to allocate skilful employees to risk-involving operations, to train unskilful workers, and/or to ensure that

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100 A. Ishizuka, "Kantoku-sha no Keiji-Kashitsu Sekinin ni tsuite" (On the Criminal Negligence of Supervisors) (1980) 942, 946, 948 *Hanrei Jiho* 3, 3, 10 at (948) 11.

101 Apart from the example listed in point "2" (to colour connecting lines), the assignment of appropriate quotas to employees may be included in this type of duty.

102 Ishizuka, *supra* note 100 at (942) 3.

103 Ishizuka, *ibid.* at (948) 11.

inexperienced employees are supervised by experienced superiors during their operation (the establishment of supervision and training system to prevent collection errors). This type of corporate duty obviously overlaps with the first type of the risk-averting duties advocated by Ishizuka. The second component of corporate risk-averting duties is to establish the communication system or liaison between corporate policy-making officials and those who are likely to detect prospective deficiencies of the risk-averting systems (the establishment of a communication system to avoid transaction errors). The establishment of liaison may be conductive to discharging the second and third types of Ishizuka's risk-averting duties in order both to help the employees not to make mistakes and to prevent their possible mistakes from causing the prohibited result. The final component of corporate risk-averting is to conduct periodic inspections of the existing risk-averting systems (Ishizuka's fourth and fifth types of risk-averting duties), in order for corporate policy-making officials properly to assess the existence of the risk.[104] If any information as to some deficiency of the established risk-averting systems is transmitted to corporate policy-making officials, the imposition of periodic inspection duties may induce them to take prompt measures to correct it prior to the occurrence of the disastrous result.

Together with Ishizuka's classification of risk-averting duties, the following methods may make it more appropriate to find corporate assessment errors on the extent of the risk involved in the corporate operations: (1) the introduction of the concept of notification adopted in the reactive fault model;[105] and (2) the imposition of a legal duty to assess the risk duty upon it. A legislative example of the risk assessment duty (2) is found in the Management of Health and Safety at Work Regulations 1992, which requires corporate and individual employers of all types of work (except sea transport)

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104 Periodic inspections may also be conducted through "outside audits and regular compliance reports." See Anonymous, "Developments in the Law - Corporate Crime: Regulating Corporate Behavior through Criminal Sanctions" (1979) 92 *Harvard Law Review* 1227 at 1258, as referred to in Chapter 4, text accompanying note 117.

105 *Supra* note 93. As for a legislative model of "notices," see, for example, sections 21 and 22 of the Health and Safety at Work etc Act 1974 ("improvement notices" and "prohibition notices" respectively, issued by an inspector, who is appointed by the relevant enforcing authority (section 19 of the Act).

to assess risks and neutralise them.[106] Regulation 3(1) states:

> "Every employer shall make a suitable and sufficient assessment of -
>
> (a) the risks to the health and safety of his employees to which they are exposed whilst they are at work; and
>
> (b) the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking
>
> for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him, by or under the relevant statutory provision."[107]

According to Forlin and Appleby, the requirements of risk assessments are also referred to in the Code of Practice relating to the Regulations and approved by the Health and Safety Commission, particularly, in their Preface and the heading of "General Principles of Risk Assessment" as follows:

> "[Preface] - Although failure to comply with any provision of this code is not in itself an offence, that failure may be taken by a Court in criminal proceedings as proof that a person has contravened the regulation or sections of the [Health and Safety at Work etc] 1974 Act."
>
> "[General Principles of Risk Assessment] - A risk assessment should usually involve identifying the hazards present in any undertaking (whether arising from work activities or from other factors, *e.g.* the layout of premises) and then evaluating the extent of the risks involved, taking into account whatever precautions are already being taken. In this Approved Code:
>
> (a) a hazard is something with the potential to cause harm (this can include substances or machines, methods of work and other aspects of work organisation);
>
> (b) risk expresses the likelihood that the harm from a particular hazard is realised;
>
> (c) the extent of the risk covers the population which might be affected by a risk, *i.e.* the number of people who might be exposed and the consequences to them.
>
> Risk therefore reflects both the likelihood that harm will occur and its severity."[108]

The Preface of the Code means that account may be taken of the employer's failure to

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106 See G. Forlin & M. Appleby, "Corporate Manslaughter by Gross Negligence" (1998) *Practical Research Papers - Crime - Offences - Homicide* (Sweet & Maxwell, London), pp. 10-11.

107 Management of Health and Safety at Work Regulation 1992, SI 1992/2051, Regulation 3 "Risk Assessment". "The Regulation makes provision for review and requires that where there are five or more employees that the risk assessment is recorded in writing." Forlin & Appleby, *supra* note 106 at 10.

108 Forlin & Appleby, *supra* note 106 at 10. The term "risk" used in the Heading of "General principle of risk assessment" corresponds precisely to one used throughout this thesis. See *supra* text accompanying note 45.

assess the risk as proof in criminal proceedings that s/he is in violation of the relevant provision of the Act. Under the proposed model of corporate liability for manslaughter here, the employer's duty to assess the risk at issue is viewed as part of his/her duties to avert the risk. Thus, if it is proved that the corporate employer's failure properly to take risk-averting actions is (1) based on its breach of the risk assessment duty and (2) causally linked to the prohibited result, it can be held liable for reckless manslaughter:[109] that is, the corporation is to be blamed for its conduct (lack of, or insufficient, safety systems) in relation to mental states (improper risk assessments).

Forlin and Appleby properly point out that risk assessments "require the company to be proactive."[110] "Proactive" means, of course, prior to the occurrence of the *actual* harm. Given that the risk expresses the probability or likelihood of the occurrence of harm, the type of necessary risk-averting actions may vary according to the degree of the likelihood of harm. Accordingly, carrying out the risk assessment, to echo Forlin and Appleby, "is not the end of the matter. Once a risk assessment has been carried out the company has to consider it and introduce mechanisms to reduce the risk."[111] This leads to the conclusion that the risk assessment should be made prior to the occurrence of the *actual* harm, whilst the risk-averting actions may be required to be taken prior to or reactive to the occurrence of the likelihood of harm.

5.5.3. A Statutory Model of Corporate Liability for Manslaughter under the Risk-Oriented Theory

The new approach that has so far been suggested is called here the "risk-oriented theory." An outline of this new theory can be summarised in the following statutory

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109 Forlin & Appleby argue that failure to carry out a risk assessment may constitute negligence (carelessness) for manslaughter. *Ibid.* As described earlier, the risk assessment and risk judgment is to be distinguished in this thesis' position in terms of the offender's state of mind toward the existence of the risk. Once s/he acknowledges the risk itself, his/her subsequent underestimation of the scale of the risk and overestimation of his/her risk-averting skills are considered his/her breach of duty to assess the risk.

110 Forlin & Appleby, *ibid.*

111 *Ibid.*

model.[112]

1. - (1) A corporation which, by its lack of a sufficient safety system, causes death of a person is guilty of reckless manslaughter if -

(a) it is aware, through its decision-making officers, of a risk that its lack of a sufficient safety system will cause death or serious injury; and

(b) it is unreasonable for it to take that risk having regard to the circumstances as it, through its decision-making officers, knows or believes them to be.

(2) the corporation's awareness of the risk may be established by proving that its decision-making officers fail to make a suitable and sufficient assessment of -

(a) the risk to the health and safety of its employees to which they are exposed whilst they are at work; and

(b) the risk to the health and safety to persons not in its employment arising out of or in connection with the operation by it of its undertaking

for the purpose of identifying the measures, it, through its decision-making officers, needs to take to comply with the requirements and prohibitions imposed upon it, by or under the relevant statutory provision.

(3) the corporation's failure to make a suitable and sufficient assessment of the risk may be established by proving that it, by its decision-making officers, fails to take reasonable steps to avert the risk after its receipt of notice as to the existence of the risk, issued by a court or administrative agency.

2. - (1) A corporation which, by its lack of a sufficient safety system, causes the death of a person is guilty of killing by gross carelessness if -

(a) a risk that its lack of a sufficient safety system will cause death or serious injury of a person would be obvious to a reasonable corporation in its position:

(b) it is capable, through its decision-making officers, of appreciating that risk at the material time; and

(c) the relevant safety system falls far below what can reasonably be expected of the corporation in the circumstances.

(2) There is a lack of a sufficient safety system by a corporation if it is established that the way in which its risk-involving operations are managed and organised fails to ensure the health and safety of persons employed in or affected by those operations; by

(a) proving that it fails to establish proper training or supervision systems in order to employ competent staff for risk-involving operations, to train unskilful employees, and/or to ensure that inexperienced workers are supervised by experienced superiors during their operation;

(b) proving that it fails to establish the communication system or liaison between corporate policy-making officers and workers involved in the relevant operations; and/or

(c) proving that it fails to use the established communication system stated in

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[112] Defences available to the corporation will be discussed in the next chapter.

(2)(b) or to conduct periodic inspections as to the existing safety system in order for its decision-making officers to make proper judgments as to the presence of the risk.

(3) A lack of a sufficient safety system may be regarded as a cause of a person's death notwithstanding that the immediate cause is the act or omission of an individual.

(4) In this section, "corporate decision-making officers" means officers of the corporation with such executive authorities that their decisions may fairly be assumed to affect risk-involving operations and safety systems of the corporation.

3. In the above sections 1 and 2,

(1) the risk expresses the likelihood that the harm from a particular hazard (including machines, methods of work and other aspects of work organisation) or operation is realised;

(2) the risk reflects both the likelihood that harm will occur and its severity.

5.6. A Comparison with Other Approaches

The risk-oriented theory is based on the Law Commission's proposals for *individual* liability for manslaughter, and reflects, to some degree, organisation theories examined in the previous chapter. The idea of corporate "policy," "practices" or "cultures" is built in the term "system" used by the risk-oriented theory, such as the establishment of supervision and training system (designed to prevent collection errors), communication system (designed to avoid transaction errors), periodic inspection system (designed to prevent judgment errors and/or assessment errors). The aim of incorporating the concept of "system" into the risk-oriented theory is, unlike the corporate policy model, to capture corporate conduct, not corporation' mental states.[113] As suggested earlier, the lack of sufficient risk-averting systems may imply either corporate intention, recklessness or negligence in relation to the prohibited result. It cannot, however, tell us which corporate states of mind existed at the material time. Thus, the required corporate mental states (recklessness or gross carelessness) should be proved by evidence that one or more of these types of errors on the part of the corporate defendant existed at the material time.

In addition, the model of corporate proactive fault is also reflected in the risk-oriented theory. Any corporate failure to exercise due diligence to prevent the occurrence of the risk of harm is enumerated in terms of "errors" mentioned above. As

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[113] *Supra* note 42.

will be referred to in the next chapter, the corporation will be granted a defence if it makes an all-out effort to avoid these errors. Unlike the proactive model, however, the burden of proof is not reversed under the risk-oriented theory. As Clarkson properly indicates, "Convicting companies of the same offences [= common law offences such as manslaughter], established in the same way as those committed by individuals, is the best route to emphasising the seriousness of the crime and expressing the appropriate degree of censure."[114] To maintain the same degree of censure for both corporate and individual fault, no special modification should be made concerning the burden of proof.[115]

Finally, the idea of notification used under the reactive fault model is reflected in the risk-oriented theory.[116] The main purpose of incorporating the concept of notification is to draw a clear line between corporate judgment errors and corporate assessment errors in relation to the existence of the risk. Once any notice issued by a court or administrative agency is sent to the corporation, its top management are presumed to perceive the risk. It should be noted here, however, that corporate gross carelessness under the risk-oriented theory is not limited to the case in which it fails to establish a safety system in reaction to the risk. The corporation's duty to avert the risk ranges from its proactive to reactive efforts to prevent the risk, depending on the degree of the likelihood of the occurrence of the actual harm.

Apart from these organisation theories, there are four other theories for corporate

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[114] Clarkson, *supra* note 17 at 572.

[115] As mentioned in Chapter 3, n.24, corporations have been considered to cause health and safety risks either by creating occupational harm to workers, by selling the defective goods and services to consumers and customers, or by deteriorating the environment affecting the general public. These risk-causing activities are already regulated in English law in terms of codifying offences of strict liability. The meaning of prosecuting corporations for manslaughter is to attach severer blame to them than that for strict liability offences. The following is what Clarkson goes on to say on the matter:

> "[T]ransforming all known offences in English law into *prima facie* crimes of strict liability simply because they are committed by companies smacks of overkill and unfairness. More significantly, it could be counter-productive in that 'corporate manslaughter' would be perceived as different from 'manslaughter,' which could again contribute to the continued marginalisation of such offences."

Clarkson, *supra* note 17 at 572.

[116] *Supra* notes 93 and 105.

liability: the duty stratification approach; constructive corporate liability approach; aggregation theory; and management failure approach. In order to demonstrate several advantages of the risk-oriented theory over these theories, each theory will be outlined and critically examined below.

5.6.1. The Duty Stratification Approach

The duty stratification approach has been intended by Rogozino to "apply in situations where acts constituting a statutory violation have occurred, but no individual retains the requisite mens rea."[117] The first step of this approach is to call for an adoption of an adequate compliance program which requires a corporation to ensure that each of its employees understands the laws relevant to the corporation's activities.[118] In determining whether the corporation actually implements compliance programs, this approach focuses on the roles of individuals who are in two different positions: lower-level employees who actually perform violative acts but do not retain the requisite *mens rea*, and their superiors upon whom a duty is imposed to make their inferiors aware of the statutory obligations. This approach would find corporate liability when its superior (or those to whom the superior delegates his/her responsibility) "fails to inform lower-level employees of a pertinent statute, or fails to fully explain its application to an employee's conduct."[119] In other words, the superior's breach of such a duty is considered, under this approach, to comprise corporate culpability.[120]

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117 A. Rogozino, "Replacing the Collective Knowledge Doctrine with a Better Theory for Establishing Corporate Mens Rea: The Duty Stratification Approach" (1995) 24 *Southwestern University Law Review* 423 at 448, arguing that since the vicarious liability is imposed on a corporation in the US, there is no need to apply this approach to cases in which an actual offender retains the requisite *mens rea*. *Ibid.* at 457.

118 Rogozino, *ibid.* at pp. 449-454. Corporate compliance programs have been mandated in the US since the new Federal Sentencing Guidelines (issued by the United States Sentencing Commission) became effective for organisations on 1 November, 1991. US Sentencing Commission, *Sentencing Guidelines Manual* (1998, ch.8, available through http://www.ussc.gov./), which will be analysed in the next chapter.

119 Rogozino, *supra* note 117 at 456.

120 Under this approach, a corporation will be held liable if (1) the superior is found to have knowingly or intentionally breached his/her duty to assure compliance, or (2) the superior properly informed the lower-level employees of statutory obligations, but the employees acted knowingly for the benefit of the corporation. Rogozino, *ibid.* at pp. 457-458. As for the superior's personal liability, s/he will no be held liable when properly discharged his/her duty, or when

One noticeable feature of this approach is that corporate liability is based on the superior's breach of a supervisory duty to inform lower-level employees of statutory obligations. This is a similar aspect of the risk-oriented theory which would find corporate collection errors when inexperienced or poorly-trained workers are engaged in the risk-involving operations. However, the most obvious disadvantage of the duty stratification approach lies in the fact that it is "only concerned with crimes requiring some proof of intent"[121], so that it is difficult to apply it to the cases of manslaughter which requires proof of recklessness or gross carelessness. Even if applied, the duty stratification approach would focus only on the superior's reckless or negligent breach of his/her duty to train the employees and, then, the other aspects of corporate fault, such as the lack of safety system, might be neglected. As discussed in the previous subsection, the top management's failure in supervisory duty may comprise corporate recklessness or carelessness in some situations, but more detailed and extensive analysis may be needed as to the role of each corporate personnel in the whole corporate system in cases of corporate manslaughter.

5.6.2. The Constructive Corporate Liability Approach

Next, the constructive corporate liability approach has been advocated by Laufer.[122] This approach consists of constructive corporate actions and corporate mental states. Under this approach,

> "corporate intentionality and action may be found in: (1) agents whose actions and intentions are related to each other in such a way that they come to take on characteristics of the organization, (2) agents whose relationship to the organization is such that their acts and intents are those of the organization, and (3) aspects of the organization, such as policies, goals, and practices, that come to reflect more that the collective nature of agents' intentions and actions (primary action and intentions). Corporations may be distinguished from aggregations of individuals on the basis of their structure, decisionmaking, size, formality, functionality, and complexity." [Footnotes omitted][123]

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merely negligent or reckless in that s/he did not fully or clearly explain a particular statute's relation to an employee's conduct. *Ibid.* at 458.

121 *Ibid.* at 466.

122 W.S. Laufer, "Corporate Bodies and Guilty Minds" (1994) 43 *Emory Law Journal* 647.

123 Laufer, *ibid.* at pp. 676-677.

As for corporate actions, on the one hand, Laufer insists that "an act that is owned or authored by the corporation"[124] may be identified through an objective test where:

> "it is determined that given the size, complexity, formality, functionality, decisionmaking precess, and the structure of the corporate organization, it is reasonable to conclude that the agents' act are the actions of the corporation."[125]

Under the reasonableness test used to identify the agent's act as the actions of the corporation, "the stronger the agent-entity relationship, the more reasonable it is to consider an agent's action to be a construction of corporate conduct.[126]

> "As the agency-entity relationship increases, actions (in the form of choices and decisions) become impersonal. Agents who have been given the authority, through delegation, to carry out their duties, with a certain power and responsibility, act for the organization, on behalf of the organization, and with a consideration of organizational goals and objectives." [Footnote omitted][127]

In a word, the reasonableness of the construction of corporate conduct is based on the strength of the relationship of the agent to the entity, and if the strength of the relationship is considered sufficient to determine the corporation's authorship of the act at issue, corporate liability emerges as to the constructive corporate action.

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124 *Ibid.* at 682.

> "Both "ownership" and "authorship" are critical terms for the proposed models. The former reflects the connectedness between an agent's acts or intents and the organization's. The latter reflects an action or intention that is not attributable to any single agent or group, but rather comes from the organization. Such actions and intentions will almost always be derivative of individual or group action."

Ibid. at n.132.

125 *Ibid.* at 682. Thus, proof of corporate "primary" actions is constructive under Laufer's approach. The following is what Laufer has to say on the matter:

> "The term "constructive" will be used throughout the balance of this Article in relation to primary acts and intents. The word is used to reflect the process of construing facts, circumstances, conduct, and results. In common legal practice, a constructive *X* is not an actual *X*, but an interpretation of *X* in the context of its legal significance. Thus, constructive assent, authority, or knowledge is not actual assent, authority, or knowledge but a legal construction that is inferred or assumed. A model of constructive corporate fault is not actual fault, but the legal construction of corporate intention based on reasonableness judgments. Construction of a legal term, unlike interpretation, allows for reference to aspects of the term's character that it assumes in the context in which it is used, given the policies that underwrite its utility and existence."

Ibid. at 680, n.123.

126 *Ibid.* at 687.

127 *Ibid.*

As for corporate mental states such as purpose, knowledge, recklessness and negligence,[128] on the other hand, Laufer considers "a wide range of states of mind derived from organizational attributes, feature, processes, and structures in relation to the actions of corporate agents."[129] Under the constructive corporate culpability model, each corporate state of mind may be found as follows:

> "Purpose:
>
> > A corporation acts purposely if its object or goal is to engage in conduct or cause a result and, if the offense involves attendant circumstances, there is an awareness of such circumstances, or a belief that they exist.
>
> Knowledge:
>
> > A corporation acts knowingly when there is an awareness that conduct exists of a certain nature, or there is an awareness that it is practically certain that its conduct will cause a result.
>
> Recklessness:
>
> > A corporation acts recklessly when there is a knowing disregard of a substantial and unjustifiable risk that a material element of the offense exists or will result. The risk must be such that its disregard involves a gross deviation from the standard of conduct expected of a corporation in its situation.
>
> Negligence:
>
> > A corporation acts negligently when it should be aware of a substantial and unjustifiable risk that the material element of the offense exists or will result. The risk must be such that failure to perceive it involves a gross deviation from the standard of care exercised by the average corporation in its situation."[130]

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[128] These types of state of mind correspond to those provided in Section 2.02. of the American Model Penal Code (1985, The American Law Institute, Philadelphia). Laufer, *supra* note 122 at 716.

[129] Laufer, *supra* note 122 at 715. The terms such as "attributes," "features," "processes" or "structures" are frequently used in organisation theories, which are examined in the previous chapter. Yet, Laufer emphasises that unlike the models of corporate policy, reactive fault and proactive fault, the model of constructive corporate fault can properly assess all types of mental states (*ibid.* at 715, n.269), by providing numerous examples of organisational variables, such as size (*e.g.*, the number of employees), goals (*e.g.*, statements and evidence of long-term corporate objectives), strategies (*e.g.*, plan of action with a consideration of resource allocation), culture (*e.g.*, central or key values, norms, and beliefs shared by organisation), specialisation (*e.g*, extent to which tasks are divided into job assignments), formalisation (*e.g.*, extent to which there is written documentation of organisational behaviour and activities), hierarchy of authority (*e.g.*, level of employee responsibility in relation to span of control), centralisation (*e.g.*, extent to which authority is maintained at the highest levels of the hierarchy of authority, or delegated to lower levels), and complexity (*e.g.*, the number of levels within the hierarchy; the number of corporate locations; and the number of job across an organisation). *Ibid.* at 725 ("Table 5").

[130] Laufer, *ibid.* at 725 ("Table 5").

The above constructive corporate liability approach is based on Laufer's understanding of the concept of culpability, which takes an intermediate position between descriptive and normative theories of culpability.[131] At first, Laufer argues that "[t]he difference between and among purposeful, knowing, reckless, and negligent wrongdoing is incidental to a normative assessment. Differences in the descriptive hierarchy of mental states are important only if they reflect important differences ...."[132] Yet, Laufer rejects an explicitly normative theory that dispenses with proof of a state of mind,[133] by asserting that descriptive mental states are relevant to moral and legal responsibility so that they are indispensable.[134] Laufer then concludes that reference to culpable mental states still needs to be made in determining the defendant's criminal liability, "but those mental states need not be proved by an entirely subjective standard": corporate mental states can be proved "with reasonable judgments."[135]

> "[C]onstructive corporate culpability facilitates proof of the presence of a corporate mental state. It permits fact finders to move beyond the strictures of subjective evidence of culpability in order to find corporate states of mind that may be more reasonably deduced or inferred - with or without the assistance of subjective evidence proffered by the defendant. The search is for the best possible estimation of a corporate mental state through actual knowledge, as well as through reasonable inferences. Did the actions of the corporation, given the circumstances, objectively manifest intention or purpose, awareness or knowledge, indifference or recklessness? Would the average corporation of like size, structure, and complexity have known of the risks of injury? Notwithstanding any evidence of actual knowledge, there are the central questions of constructive fault."[136]

Despite its sophistication, this approach can be criticised for two reasons. The first criticism is related to the standards of reasonable inference used to construe corporate

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131 See Chapter 4, text accompanying notes 108-112.

132 Laufer, *supra* note 122 at 702.

133 Laufer cites G.P. Fletcher, "The Theory of Criminal Negligence: A Comparative Analysis" (1971) 119 *University of Pennsylvania Law Review* 401 at 414 ("if *mens rea* refers not to a specific subjective state, but to the actor's moral culpability in acting as it does, then there might logically be a way to establish personal culpability without referring to a state of mind."). Laufer, *supra* note 122 at pp. 702-703.

134 Laufer, *supra* note 122 at 703.

135 Laufer, *ibid.* at pp. 703-704.

136 *Ibid.* at pp. 704-705.

actions and requisite mental states. Like corporate policy, ethos, or character theories,[137] this approach requires fact finders and prosecutors to consider innumerable organisational variables.[138] Given that most evidence concerning corporate policy, practice, goal or ratification of illegal actions are likely to be internal to the corporation, labourious efforts may be required for the prosecution to obtain "corporate records, internal memos, and the cooperation of witness whose interest may be adverse to those of the government."[139] As a result, it may place "an enormous burden on prosecutional resources."[140] Added to this, the assessment of these variables involves fact finders in mere fact-dependent inquiry and, therefore, it provides them with little guidance in determining the specific corporate state of mind.[141] As mentioned in the previous chapter, the existence of organisational rules or practices itself cannot explain exactly what result the *corporation* intended to cause.[142]

It is for this reason that the risk-oriented theory, unlike the constructive corporate liability approach, adopts corporate risk-averting systems relevant to the risk in order

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137 Chapter 4, Subsection 4.1.2.

138 *Supra* note 129. Laufer provides the following examples required for proof of each type of state of mind:

> "Purpose: desire to commit an illegality, coupled with foresight that action will result in harm; policy or practice encourages illegality; goal or objective of action is the illegality; the ratification or endorsement of the violation by the corporation; express or tacit authorisation of illegality;
> Knowledge: tolerated or permitted the illegality; consented or indulged the activity; willing to have crime occur;
> Recklessness: deliberate inattention to substantial risks of harm; willful neglect; knowing indifference;
> Negligence: inadequate management, control, or supervision of employees; management should have known of a substantial risk of harm given employee activities; failure to make reasonable efforts or take reasonable precautions to prevent crime commission; proactive due diligence; unreasonableness of corporate practices and procedures; harm was foreseeable but did not prompt corporate response"

Laufer, *supra* note 122 at 725 ("Table 5").

139 J. Moore, "Corporate Culpability under the Federal Sentencing Guidelines" (1992) 34 *Arizona Law Review* 743 at 778.

140 Moore, *ibid.*

141 Moore, *ibid.* at 777; Ragozino, *supra* note 117 at 442.

142 Chapter 4, text accompanying notes 85-91. Thus, Moore suggests that these factors that are considered under the corporate policy, ethos or character theories for corporate liability should be assessed at sentencing. Moore, *supra* note 139 at 778.

not to form the requisite corporate mental states, but to form corporate conduct. Once it is proved that the lack of, or insufficient, risk-averting systems is one of the causes of the prohibited result, the risk-oriented theory then infers corporate mental states (recklessness or gross carelessness) from the existence of corporate errors in relation to these systems.

The second criticism of the constructive corporate liability approach results from its effort to construe corporate action. As referred to earlier,[143] this approach incorporates the unique concept of "authorship" or "ownership" for construing corporate action. Since Laufer attempts to maintain a concurrent relation of corporate action to corporate culpability (mental states),[144] the reasonable inference standards are again utilised to determine the strength of the agent-entity relationship. Once the degree of this relationship is deemed under the reasonable inference standards strong enough to consider the corporation to author or own the agent's act at issue, then that act is construed as part of corporate actions. Despite its novelty, however, the concept of authorship or ownership provides little explanation as to how it can be distinguished from "imputation" or "identification" in this context.

Suppose that the agent performs an illegal conduct in accordance with the corporation's policy or practice. Once it is proved that the act is done within the scope of his/her employment on behalf of the corporation, the vicarious liability doctrine allows his/her act to be imputed to the corporation. Under the corporate constructive liability approach, the same result may be obtained because his/her conduct simply manifests corporate illegal policy. The only difference between the two is whether to say "his/her conduct is imputed to the corporation" or "it is owned by the corporation through its policy." The same is true of the identification principle or the high managerial agent approach. As mentioned in Chapter 2,[145] s/he is identified as a controlling officer or high managerial agent under these theories simply because his/her position and authority in the corporate hierarchy are considered likely to make him/her

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143 *Supra* text accompanying notes 124-127.

144 Laufer, *supra* note 122 at 686.

145 Chapter 2, text accompanying note 230.

represent corporate policy.[146] Similarly, the higher his/her position is in the corporate hierarchy, the more likely that the agent-entity relationship is viewed as strong under the reasonable inference standards, so that it is *made* reasonable by this approach that an agent's action is owned by the corporation.

Given the fact that a corporation cannot perform criminal conduct in the physical sense, it is undeniable that proof of corporate conduct is somewhat constructive. This does not necessarily mean, however, that the agent's act should be regarded as the whole part of corporate conduct in relation to corporate fault. It is for this reason that under the risk-oriented theory, *any* corporate personnel's conduct is considered a mere cog in the corporate wheel in relation to the risk.[147]

5.6.3. The Aggregation Theory

Apart from the prosecution's theory in the P & O case,[148] the aggregation theory can be found in Section 12.4. of Australian Criminal Code Act 1995 as follows:

> "(1) The test of negligence for a body corporate is that set out in section 5.5.
>
> (2) If:
>
> (a) negligence is a fault element in relation to a physical element of an offence; and
>
> (b) no individual employee, agent or officer of the body corporate has that fault element;
>
> that fault element may exist on the part of the body corporate if the body corporate's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).
>
> (3) Negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:
>
> (a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or
>
> (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate."[149]

Subsection (2) expresses the aggregation theory as to negligence, whilst subsection (3)

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146 See §2.07(4)(c) of the American Model Penal Code, cited in Chapter 4, n.36.

147 *Supra* text accompanying notes 31-33 and 41-42.

148 Chapter 3, text accompanying notes 88-90.

149 Chapter 4, text accompanying note 128.

provides the way in which negligence may be proved. Subsection (3)(a) is very similar to the concept of collection errors under the risk-oriented theory, whilst subsection (3)(b) is similar to transaction errors. Unlike the risk-oriented theory, however, this Act fails to provide any sound reason why proof of subsection (3)(a) or (b) establishes corporate negligence. Consider the following quotation.

> "Treating corporations as potential objects of blame in their own right permits a more sophisticated law of corporate negligence. One advantage is that aggregation of individual negligence not only becomes possible but also is given a clear rationale. When a number of individuals within a corporation have been negligent to some degree, the corporation may well be judged to have been *grossly* negligent. The failure of the corporation to guard against a widespread pattern of negligence by its individual representatives may amount to a more serious breach of its own duty of care...."[150]

It is apparent that this line of argument is based on a *non sequitur*, since no explanation is given as to why the aggregation of several senior officers' mere (namely, not gross) negligence can amount to corporate *gross* negligence. Unless and until each individual's negligence interrelates in particular contexts, such as risk-involving operations, to follow Wells' metaphor, two plus two still equals four, not five.[151]

As mentioned above,[152] the risk-oriented theory views each individual's negligence a mere cog in the whole corporate fault. But this does not mean that the aggregate of individuals' negligence amounts to corporate negligence. The relationship between individual and corporate fault should be compared to a chemical formula that $H_2 + O_2 = H_2O$. That is to say, each individual's conduct is either hydrogen or oxygen, which by itself does not amount to water. For both hydrogen and oxygen to be combined into water, a certain chemical treatment or action is needed. Under the particular corporate risk-averting action or system, each individual is assigned a certain role to play in order for the system to operate. Even if some of individuals are negligent in playing their roles, it is still not certain whether the whole risk-averting system fails to work correctly. For their negligence to cause the whole system's malfunction, some

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150 Colvin, *Corporate Liability*, *supra* note 28 at 27. See also Smith, *supra* note 47 at p. 189, cited in Chapter 4, n.24.

151 C. Wells, *Corporations and Criminal Responsibility* (1993, Clarendon Press, Oxford), p.88 ("2 + 2 = 5?")

152 *Supra* text accompanying note 147.

"error" needs to be inherent in the system itself (= a chemical treatment or action). If, for example, poorly-trained workers are assigned a certain operation in relation to the source of work (= collection errors), and their probable mistakes trigger the disaster, it is both their probable mistake and inadequate supervision or training system that combine to form the prohibited result, for which the corporation should be blamed.[153]

Under the risk-oriented theory, one or some of the errors inherent in the corporation's risk-averting system is or are considered causally linked to the prohibited result. Whether it is held liable for reckless manslaughter or manslaughter by gross carelessness is determined according to the type(s) of error. However, the aggregation theory adopted in the Australian Criminal Code Act provides no firm guidance as to what connects each individual's negligence, or as to why the aggregation of their negligence can be said to be causally linked to the result.

5.6.4. The Management Failure Approach

As referred to earlier,[154] a management failure approach has been recommended by the Law Commission. Under Section 4 of its draft bill,

> "(1) A corporation is guilty of corporate killing if -

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153 The idea of the relationship between individual and corporate fault developed here has been inspired by the dramaturgical model, one of the organisation theories submitted in I. Mangham, *Interactions and Interventions in Organizations* (1978, Wiley, New York). Under this model, the role of each corporate personnel in organisational activities is compared to that of figures in the dramaturgical world: corporate representative or top executive official to producer; board of directors to playwright; managerial agents or supervisors to directors; and employees to actors. The central question here is: if a play amounts to an illegal act of pornography, who is to blame? Mangham attempts to answer this question by dividing the corporate decision-making structure into a bottom-up and top-down ones. In the former case, a "producer" has primary and overall responsibility for the illegal act, but a "playwright" who writes the scripts at issue, directors who have a chance to modify the scripts, and actors who have a chance to refuse to play their role, may share the responsibility. In the latter case, on the other hand, the scripts are written in a process of negotiation between actors and directors. Thus, if the scripts are criminogenic, responsibility lies with both the actor and the director. Furthermore, the dramaturgical model is applicable to responsibility of those who are outside the organisation - the critics (a regulatory agency) and the audience (customers). That is, a regulatory agency cannot escape responsibility if the company's violation of the law is tolerated or ignored by him/her. The customers as responsible agents may arises when the violation is demanded by them - an audience at a night club which throws objects on the stag when the script does not allow the performer to take off his/her clothes. For further details of some organisation theories, see, for example, Fisse & Braithwaite, *supra* note 29, ch.4.

154 *Supra* text accompanying notes 5-11.

(a) a management failure by the corporation is the cause or one of the causes of a person's death; and

(b) that failure constitutes conduct falling far below what can reasonably be expected of the corporation in the circumstances.

(2) For the purposes of subsection (1) above -

(a) there is a management failure by a corporation if the way in which its activities are managed or organised fails to ensure the health and safety of persons employed in or affected by those activities; and

(b) such a failure may be regarded as a cause of a person's death notwithstanding that the immediate cause is the act or omission of an individual.

(3) A corporation guilty of an offence under this section is liable on conviction on indictment to a fine.

(4) No individual shall be convicted of aiding, abetting, counselling or procuring an offence under this section but without prejudice to an individual being guilty of any other offence in respect of the death in question."[155]

Apart from inadequacy of the omission of the requirements of recklessness and obviousness in gross carelessness,[156] one of the noticeable features of its draft bill is the replacement of the individual's gross carelessness with corporate management failure, specified in subsection (2)(a). This concept is based on an employer's duty to provide a safety system of work for employees in the body of civil law.[157] This duty consists of several branches: (i) to provide a safe place of work, including a safe means of access; (ii) to employ competent staff; (iii) to provide and maintain adequate appliances; and (iv) to provide a safe system of work.[158]

As compared with the risk-oriented theory, failure to perform duty (ii) may amount to collection errors, whilst duties (i), (iii) and (iv) are all concerned with the corporation's risk-averting actions after its "brains" perceive the probable occurrence of harm. However, there is no equivalent of the concept of transaction error or Section 12.4(3)(b) of the Australian Criminal Code Act 1995 in the Law Commission's

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155 Law Commission, *Draft Bill*, *supra* note 43.

156 *Supra* text accompanying notes 12-17.

157 Law Commission, *Involuntary Manslaughter*, *supra* note 2 at paras. 8.10-8.34. As Sullivan points out, however, "[t]he Law Commission was, of course, using this case law as a guide to corporate liability for any deaths causally related to the company's activities and not merely the work related deaths of its employees." Sullivan, *supra* note 14, n.122. This is reflected in subsection (2)(a) (".... the health and safety of persons employed in *or* affected by those activities").

158 Law Commission, *Involuntary Manslaughter*, *supra* note 2 at para. 8.12.

proposal. This is an unfortunate omission by the Law Commission, since it is probable that the corporation's failure in one or some of the duties (i)-(iv) may results from the lack of an adequate system for conveying relevant information from employees (who detect some deficiency in the established safety system or appliances) to corporate decision-making officials. Together with the establishment of corporate recklessness based on the concept of assessment errors, the risk-oriented theory has certain advantages over the management failure approach at this point.

Other features of the draft bill are subsections (1)(a) and (2)(b), which specify express provisions of causation. These subsections display this draft bill's obvious advantage over the aggregation theory adopted in Section 12.4(3) of the Australian Criminal Code Act 1995. As mentioned in the previous subsection of this chapter, the aggregation theory adopted in the Australian code provides no explanation as to why each individual's negligence should be aggregated to form corporate negligence and, accordingly, this theory may obscure a clear line between individual and corporate negligence. The Law Commission's draft bill seems to succeed in drawing a line between the two, by way of emphasising a causal link between corporate management failure and the prohibited result. There are two conceivable cases where the corporate management failure and individual conduct fault coexist: (1) the immediate cause of the death at issue is a deliberate act or omission by an employee; and (2) the immediate cause was a mere operational negligence by her. The Law Commission thought that in the former case, the chain of causation between the corporate management failure and the result would be broken,[159] whilst in the latter case, any consequence of the individual's negligence should be treated as a consequence of the corporate management fault if her negligence was foreseeable.

> "For example, the immediate cause of the death might be the failure of an employee, through lack of attention, to give a signal which she was employed to give. Indeed, depending on the circumstances, the employee in question may personally be guilty of our proposed offence of killing by gross carelessness. It does not, in out view, follow that the employee's conduct should in itself absolve the *corporation* from liability, because the management failure may have consisted in a failure to take precautions against the very kind of error that in fact occurred. If a company chooses to organise its operations as if all its employees were paragons of efficiency and prudence, and they are not, the company

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159 *Ibid.* at para. 8.36.

is at fault; if an employee then displays human fallibility, and death results, the company cannot be permitted to deny responsibility for the death on the ground that the employee was to blame. The company's fault lies in its failure to anticipate the foreseeable negligence of its employee, and any consequence of such negligence should therefore be treated as a consequence of the company's fault"[160]

Unfortunately, the last sentence of this extract demonstrates the Law Commission's contradiction, which was mentioned earlier.[161] Foreseeable to whom? Since the Law Commission has rejected the view that the corporation in itself can foresee the risk,[162] more convincing explanations should be given to holding the corporation liable for its management failure even if the employee's operational negligence is the immediate cause of the death.[163]

The key solutions to the issue of causation in relation to the concurrence of corporate and individual fault are: (1) to provide the appropriate circumstances in which

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160 *Ibid.* at para. 8.37.

161 *Supra* text accompanying notes 5-11.

162 Law Commission, *Involuntary Manslaughter*, *supra* note 2 at para. 8.3.

163 It may be for this contradiction that Sullivan sees little difference between the management approach and the aggregation theory.

> "From consideration of the grounds of liability under the Commission's proposal, it would seem that aggregation need not to be invoked whenever the managerial or organisational failings of at least one associated individual fall far below of what could reasonably have been expected and constitutes one of the causes of the fatality. In such a case it is immaterial if the failings of other individuals are added to bolster the case against the company. As long as at least one individual has exhibited the culpability required, we encounter a form of vicarious liability restricted to those who perform managerial or organisational tasks. The Report insists however, that corporate liability should not be confined to circumstances where it can be proved that a managerial individual possessed the requisite culpability. It is asserted that liability may be imposed without demonstrating that any individual was culpable. Yet if the culpability does not inhere in the corporation as a thing in itself, there can only be a collective judgment on the performance of the relevant class of individuals. If a finding of corporate culpability is made in circumstances where it cannot be said of any individual member of the class that his conduct fell far beyond what could reasonably be expected and was also in a causal relationship to the death, we encounter aggregation by whatever name called... If [the Commission's proposal] does not involve aggregation, the basis of liability for this offence is obscure in what is the most prominent part of its potential application. The obscurity results from the lack of any informing theory. The Commission accepts that companies are mere legal entities, yet it essentially treats them as real entities. We are given no explanation of the reality of companies and how they may possess a culpability that is inherently their own. Consequently, it is difficult to determine what matters juries might appropriately take into account if they should ever be called upon to decide what deaths are corporate killings." [Footnotes omitted]

Sullivan, *supra* note 14 at pp. 531-532.

both faults should be considered corporate one; and (2) to specify the availability of defences to the corporation. Under the risk-oriented theory, task (1) is already completed in terms of incorporating the concepts of collection, transaction, judgment and assessment errors. These errors are, of course, made by any corporate personnel. Since the risk-oriented theory views any individuals as cogs in the corporate wheel, however, their errors are usually considered in the light of corporate risk-averting systems which the corporation is expected to establish and operate properly.[164] As a result, if the individual fault is regarded as related to one of these *corporate* errors, a causal link is properly established between *corporate* conduct and the prohibited consequences.

Solution (2) is to be more instrumental in distinguishing cases where, on one hand, the corporation should be held liable for manslaughter and those where, on the other hand, it should be immune from liability. Yet, the available corporate defences are not limited to the case in which the causal link is broken. Rather, they also result from the unavoidability of the risk inherent in the particular corporate operation and the unforeseeability of the risk to *the corporation.* Together with the issue of aggravating and mitigating factors at corporate sentencing, task (2) will be addressed in the next chapter.

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164 *Supra* text accompanying notes 151-153.

CHAPTER 6

DEFENCES AND SENTENCES FOR CORPORATE MANSLAUGHTER

6.1. Introduction

In the previous chapter, a new approach to the issue of corporate manslaughter, the "risk-oriented theory," was advanced, under which a corporation is to be held liable for manslaughter either by gross carelessness consisting of its collection, transaction and/or judgment errors in relation to the risk involved in its particular operation, or by recklessness consisting of its assessment errors of the risk. The most conspicuous advantage the risk-oriented theory offers is to equate the requirements for corporate manslaughter with those for individual manslaughter under the Law Commission's proposals for involuntary manslaughter.[1] Unlike other approaches examined in the proceeding chapters, no individual's fault is directly regarded as corporate fault. Attention is paid to the roles played by the corporate personnel in the whole corporate risk-averting systems, rather than to their personal fault.

Under the statutory example of the risk-oriented theory,[2] a corporation is held liable (1) when its lack of a safety system is "regarded as a cause of a person's death notwithstanding that the immediate cause is the act or omission of an individual;"[3] (2) when, through its decision-making officers, it is aware of (or capable of appreciating) the risk;[4] and (3) when it fails to take reasonable steps to avert the risk, or its relevant safety system falls far below what can reasonably be expected of the corporation in the circumstances.[5] These three occasions are all concerned with one of the issues that

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1 Law Commission No.237, *Legislating the Criminal Code: Involuntary Manslaughter* (1996, HMSO, London) [hereinafter cited as *Involuntary Manslaughter*].

2 Chapter 5, Subsection 5.5.3.

3 *Ibid.*, Section 3(3) of the statutory provision.

4 *Ibid.*, Sections 1(1)(a) and 2(1)(b) of the statutory provision.

5 *Ibid.*, Section 1(3) and 2(1)(c) of the statutory provision.

needs to be addressed in this chapter: in what circumstances should the corporation be immune from liability? Whilst several attempts have been made by commentators, as described in Chapters 4 and 5, to capture corporate fault and to extend the scope of corporate liability, little attention has been given by them to this issue.[6] As indicated in the last part of the previous chapter, when individual and corporate fault are concurrent, the risk-oriented theory usually considers the former fault to be part of the latter, as long as it is related to corporate collection, transaction, judgment or assessment errors. The main concern here is how to distinguish between individuals' *personal* fault and their fault as part of corporate errors. Added to this, the statutory model provided in the previous chapter did not specify what part of the risk at issue the corporation (through its decision-making officers) should be aware of or be capable of appreciating. Lastly, there may be some cases in which the corporation, not its personnel, cannot reasonably be expected to avoid or avert the risk of harm: for example, in cases in which necessary risk-averting actions may be so costly as to damage corporate assets seriously. In addressing these questions, Section 6.2. completes the new approach by providing guidance as to the circumstances in which the corporate defendant should escape liability for manslaughter.

The other issue to be dealt with here is related to corporate sentencing. There may be several cases in which corporations' efforts or attitudes in relation to the risk at

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[6] Sullivan, for example, argues for corporate liability for manslaughter on the basis of the vicarious liability tempered by a due diligence defence in the following articles: G.R. Sullivan, "The Attribution of Culpability to Limited Companies" (1996) 55 *Cambridge Law Journal* 515 [hereinafter cited as *Attribution*] (stating that "[a] company .... should be allowed to argue that despite a grossly negligent act or omission on the part of one or more of its personnel, its safety procedures and practice were all that could be reasonably asked of it at [the material] time."); "Expressing Corporate Guilt" (1995) 15 *Oxford Journal of Legal Studies* 281 [hereinafter cited as *Guilt*] (stating that ".... if a death attributable to gross negligence occurs during the course of corporate activity, the matter merits investigation in terms of the safety standards obtaining in the organization. It is pertinent to ask whether matters could have been so organized, within the requirements of regulatory law and current good practice, to prevent .... an incident or make it less likely. Better still perhaps, it should be for the company to demonstrate that its operations conformed with regulatory law and current good practice.").

Unfortunately, no clear explanation or specific definition of the terms "reasonably" and "good practice" is given by Sullivan and, hence, several important questions remain unresolved in his suggestion, such as: (1) what constitute(s) due diligence; (2) to what extent a corporation should exercise due diligence at the material time so as to escape liability; and (3) how to distinguish between a due diligence required to escape liability for manslaughter and that for regulatory offences and for what reasons.

issue should be considered aggravating or mitigating factors for the severity of sentence. As mentioned in Chapter 2,[7] new or revised penal codes have appeared in France, Spain, Portugal and Slovenia in relation to the issue of corporate criminal liability in 1990s, and proposals for legislating involuntary manslaughter (including corporate killing) have been submitted by the Law Commission. Nevertheless, no legislative solutions have hitherto been provided to resolve the issue of what types of sentencing factors should be considered for corporate sentencing, except the Organizational Sentencing Guidelines which were promulgated on 1 November 1991 in the US. It has been indicated by American commentators that since the promulgation of these Guidelines, increasing attention has been paid both to imposing heavy economic sanctions on corporations and to considering incentives for them to prevent and detect violations of law in the US.[8] Although a discussion of whether the imposition of financial sanctions on corporate offenders serves the purposes of criminal law is beyond the scope of this thesis, a critical examination of several sentencing factors provided in the Guidelines may be helpful in determining the severity of sentence in cases where corporations are held liable for manslaughter in English law.[9] While Section 6.3. is devoted to outlining the Guidelines, Section 6.4. examines the adequacy of the Guidelines by reference to some criticisms they are currently subject to.

6.2. Corporate Defences

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7 Chapter 2, n.1.

8 J.S. Rakoff, L.R. Blumkin & R.A. Sauber, *Corporate Sentencing Guidelines*: *Compliance and Mitigation* (1993, Law Journal Seminars-Press, New York), "Forward."

9 This point is emphasised by C.M.V. Clarkson, "Corporate Culpability" (1998) 2 *Web Journal of Current Legal Issues*, arguing that:

> "What is being argued here is that such CCPs (Corporate Compliance Programs) [adopted under the Guidelines] could be utilised in England and Wales as evidence of (lack of) corporate culpability. Obviously, if a crime has been committed by a company with a CCP, this means the CCP has failed. However, in terms of establishing culpability at the substantive stage, the inquiry would then shift to why, given the existence of the CCP, the crime was committed. For example, it might be that while such a CCP was in existence, it was not rigorously enforced. If an offence were one with a due diligence defence, a company without a CCP could have extreme difficulty in establishing the requisite due diligence. If the crime required proof of mens rea, the absence of a CCP would be important evidence towards the establishment of the requisite degree of blameworthiness...." [Footnote omitted]

Under the risk-oriented theory, a corporation is to be held liable when it is proved that, first, its insufficient risk-averting systems are causally linked with the prohibited result (*actus reus*); and, secondly, there are concurrent corporate errors with these systems (*mens rea*). As far as corporate gross carelessness is concerned, the following three conditions must be met: (1) a risk that the corporation's insufficient risk-averting system caused death or serious injury would be obvious to a reasonable corporation in its position; (2) the corporation was, by avoiding relevant collection, transaction or judgment errors, capable of appreciating that risk at the material time; and (3) its insufficient risk-averting systems constitute conduct falling far below what can reasonably be expected of the corporation in the circumstances.[10] In cases of corporate reckless manslaughter, proof of corporate assessment errors suffices for corporate awareness of the risk.[11] Whether it is reasonable for the corporation to take the risk, having regard to the circumstances as it knows or believes them to be,[12] will be determined by corporate brains' decisions as to improper risk-averting (or unreasonable risk-causing) actions.[13]

Corporate defences arise in relation to the above conditions: in particular, when the individual fault in question is considered irrelevant to to corporate risk-averting systems; or when corporate risk-averting systems in question do not constitute conduct falling far below what can reasonably be expected of the corporation in the circumstances. The remainder of this section is devoted to exploring these situations.

6.2.1. Causation

As referred to in the previous chapter,[14] even if no individual's conduct falls far below

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10 Chapter 5, Subsection 5.5.3, Section 2(1)(a), (2) and (1)(c) respectively of the statutory provision.

11 *Ibid.* Section 1(2) of the statutory provision.

12 *Ibid.* Section (1)(b) of the statutory provision.

13 *Ibid.*, Section 1(2) of the statutory provision. Thus, the risk-oriented theory may have some similar aspects to the identification principle as far as the requirement of unreasonableness is concerned. As will be discussed in the following subsections, however, corporate brains' decisions as to improper risk-averting or unreasonable risk-causing actions are not always identified with corporate assessment errors under the risk-oriented theory.

14 Chapter 5, text accompanying notes 38-42.

what can reasonably be expected of him/her in the circumstances, a corporation can independently be blamed for its insufficient risk-averting systems relevant to the prohibited result. Since each individual is viewed as a cog in the corporate wheel under the risk-oriented theory, the fact that they have followed the safety systems systematically and collectively suffices to comprise the corporate conduct. Yet, it is still necessary to prove a causal link between the corporation's lack of safety systems and the prohibited result.

In most cases, the safety or risk-averting systems, including supervision and training, liaison, and periodic or *ex post facto* inspections, are reflected in corporate policy-making officials' decisions. As mentioned in the previous chapters,[15] in cases where these systems are insufficient to avert the risk, it may be easier to find the required causal link between corporate conduct and the prohibited result by reference to these officials' decisions. Practical difficulties, however, may arise in determining the causal link when it is proved that corporate risk-averting systems were sufficiently effective at the material time, but the prohibited result was nevertheless caused by an intervening act or event (a *novus actus interveniens*) by individuals who were not involved in the relevant corporate risk-averting activities. With what standards can the intervening act or event of those individuals be considered sufficient to override the initial cause? This question usually arises in relation to the issue of causation, because of the concurrent nature of more than two persons' faults.

In relation to this issue of concurrent causes, an excellent analysis has been made by Nishihara.[16] It may be useful here to outline his argument on this issue. Based on

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15 Chapter 4, text accompanying notes 36-37 (the first prong of Moore and Foerschler's suggestions under which a corporate policy itself is illegal) and Chapter 5, n.64 (the Japanese concept of structural fault).

16 H. Nishihara, "Kantoku-Sekinin no Genkai-Settei to Shinrai no Gensoku (Limitations on the Scope of Supervisory Fault and the Reliance Rule)" (1978) 30 *Hoso Jiho* 181 and 365. As referred to in the previous chapter (Chapter 5, n.60), the relevant and applicable article of Japanese Penal Code in the context of corporate risk-involving operations is concerned with Article 211, which prescribes a crime of manslaughter by professional negligence. The term "person" which appears in this article has been interpreted as excluding corporations in Japan.

The other type of classification may be found in H.L.A. Hart & T. Honoré, *Causation in the Law* (1985, 2nd ed., Clarendon Press, Oxford), ch.8 ("Concurrent Causes and Contributory Negligence"). According to Hart and Honoré, cases of concurrent causes fall into the following three groups: (1) contributory causation (in which both wrongful acts are necessary conditions of

the direction of faults towards the result, Nishihara first divides the forms of concurrent causes into the type of opposite concurrence of faults and that of parallel concurrence of faults.[17] The opposite concurrence of faults is found in cases where both an offender and the victim's fault contribute to the result. This type of concurrent causes is usually called contributory negligence in the English law of torts, and is "not directly relevant" in corporate manslaughter cases.[18] Thus, focus should be shifted to the type of parallel concurrence of faults, where more than two *offenders*' faults are related to the harm to the victim.

Nishihara then subdivides the type of parallel concurrence of faults according to (1) timeframe and (2) causation. Namely, (1) the parallel concurrence of faults based on the timeframe is categorised into the following forms of the relationship between faults: (1-1) vertical coexistence and (1-2) horizontal (or temporal) concurrence, whilst (2) that based on causation is into (2-1) mere unrelated coincidence; (2-2) piled-up or one on top of another; and (2-3) cumulative coexistence (See Figure 1).[19]

Central to the timeframe categorisation of the parallel concurrence of faults (1) is, on the one hand, whether more than two faults occur on different occasions (1-1: vertical coexistence) or concur at the same time (1-2: horizontal or temporal concurrence). Suppose that a building collapsed and two causes of the collapse were found: a design error of the building's particular part made by an architect and the use of low-quality materials made by builders for the same part of the building. In this hypothetical example, the architect's design error obviously preceded the use of low-quality materials made by builders in chronological order (1-1: vertical coexistence), but

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the harm); (2) additional causation (in which one act is not a necessary condition of the harm since there is some other independent wrongful act sufficient to produce the harm); and (3) alternative causation (in which even if the defendant had complied with the law, either this or another event, which would then have happened, would have produced similar harm).

As will be found later (*infra* note 21), Nishihara's analysis is more detailed than Hart and Honoré's, hence Nishihara's classification of concurrent faults will be presented and examined here.

17 Nishihara, *supra* note 16 at pp. 184-185.

18 G. Forlin & M. Appleby, "Corporate Manslaughter by Gross Negligence" (1998) *Practical Research Papers - Crimes - Offences - Homicide* (Sweet & Maxwell), p.11.

19 Nishihara, *supra* note 16 at pp. 186-187.

Nishihara's Categorisation of the Concurrence of Faults

⇒ Opposite Concurrence (concurrence of the victim's fault and the offender's one)

(The Victim's Fault → THE RESULT ← The Offender's Fault)

⇒ Parallel Concurrence (concurrence of more than two offenders' (A & B) faults)

(A & B's Faults ⇉ THE RESULT)

(1) Timeframe

(1-1) Vertical Coexistence

A's Fault → B's Fault → THE RESULT

(1-2) Horizontal (or Temporal) Concurrence

A's Fault ↘

THE RESULT

B's Fault ↗

(2) Causation

(2-1) Mere Unrelated Coincidence

A's Fault → THE RESULT

↑

B's Fault

(2-2) Piled-Up or One on Top of Another

A's Fault → THE RESULT

⇑

(B's Fault)

(2-3) Cumulative Coexistence

A's Fault + B's Fault ⇒ THE RESULT

Figure 1

both faults which were related to the same part of the building contributed to its collapse. An example of the horizontal or temporal concurrence (1-2) is that the collapse of the building was due to the fact that several builders cut corners on different, but contiguous parts of the building simultaneously, but that each builder did not know that the other builders cut corners as well.[20]

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[20] Nishihara, *ibid.* at 186.

On the other hand, the categorisation based on causation is to be made by addressing an issue of whether one fault has the causal chain of the result without the other; namely, alternative concurrence. The case of mere unrelated coincidence of plural faults (2-1) is that the architect's design error was sufficiently powerful to cause the collapse of the building without the builders' use of low-quality materials for the same part (or vice versa), or that one builder's corner-cutting was sufficiently serious so as to cause it without the others'.

Furthermore, the case of the "piled-up or one on top of another" relationship between faults (2-2) is, according to Nishihara, that each fault is causally linked to the result, but one fault is based on a failure to prevent another fault from causing the result. For example, the architect's design error was at first overlooked by a building client who made a contract with the architect as to the design of the building and, then, neglected by a senior building supervisor employed by the construction company or subcontractor. It is certain that in this hypothetical example, the architect's design error itself had the causal chain of the collapse of the building. However, but for the absence of the subsequent several failures in proper *ex post facto* inspections, it could not cause the result.

Finally, the form of cumulative coexistence (2-3) can be found in cases in which one fault is not sufficiently powerful to have a causal chain of the result, but it becomes so when combined with others. For example, it is proved that either the architect's design error or the builders' use of low-quality materials regarding the same part of the building could not cause the collapse but, due to the vertical coexistence of both faults in the timeframe, both faults actually caused it.[21]

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21 Nishihara, *ibid.* at pp. 186-187. This category is virtually the case in which several individual faults are aggregated (namely, in which the aggregation theory applies).

Hart and Honoré's three groups of concurrence causes (*supra* note 17) may roughly correspond to Nishihara's categorisation as follows:

Hart & Honoré		Nishihara
Contributory Causation	→	Opposite Concurrence (and Cumulative Coexistence (2-3))
Additional Causation	→	Mere Unrelated Coincidence (2-1)
Alternative Causation	→	Vertical Coexistence (1-1) and Horizontal or Temporal Concurrence (1-2)

The reason for the inclusion of Nishihara's cumulative coexistence (2-3) in the first group of Hart

In determining whether the intervening act or event by individuals who are not involved in the relevant corporate risk-averting actions excludes the original corporate actions from the legal cause of the result, Nishihara's analysis of concurrent faults described above may provide certain guidance. First of all, in cases of mere unrelated coincidence of faults as part of the parallel concurrence based on causation (2-1) and of horizontal or temporal concurrence of faults as part of the parallel concurrence based on the timeframe (1-2), it is difficult to see the chain of causation broken. This is because either individual in question is actually concerned with the particular corporate risk-involving operation or with the relevant corporate risk-averting systems, so that his/her fault is considered to comprise a corporate error that renders a corporation liable for manslaughter under the risk-oriented theory. Consider the following hypothetical example based on the Cory case.[22] The victim was electrocuted on the colliery premises because a shift manager of the colliery company, who chased and got near him, pushed him into the electric wire fence by mistake. And the shift manager did not know the fact that the electric wire fence was established a few hours before the incident. In these circumstances, the company's faults are, through its controlling officers' managerial decisions, an establishment of the electric wire fence and a subsequent failure to put a notice board that could warn the victim of the fence. These faults, however, have little to do with the shift manager's personal fault and, accordingly, both the shift manager's fault and the company's fault (through its officers) are unrelated. As is often the case with the liability of the individual offender (whose victim, after being shot by the offender, died in hospital due to negligence of the hospital staff,[23]) the shift manager's fault would not affect the colliery company's liability for manslaughter of the victim.

Similarly, the "plied up or one on top of another" relationship between faults (2-2) is usually found in cases in which the top or middle management is responsible for

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and Honoré (contributory causation) is that Hart and Honoré considers not only the victim's negligence but also third party's voluntary conduct in this group. See Hart & Honoré, *supra* note 16 at p. 217. Therefore, when one individual fault is viewed as irrelevant to either corporate error but the other's fault is as relevant, it is possible to assume that the former fault is the third party's fault under the Hart and Honoré's group of contributory causation.

22 Cory Brothers Ltd. [1927] 1 K.B. 810, cited in Chapter 3, text accompanying notes 14-16.

23 See, for example, R. v. Mellor [1996] 2 Crim. App. R. 245.

a particular corporate operation or supervising his/her employees. It can be said that but for his/her fault in supervision, his/her inferior work of fault would not have caused the prohibited result. Under the risk-oriented theory, the top or middle management's supervisory fault is likely to constitute either corporate collection, judgment or assessment errors, so that the chain of causation will rarely be broken.[24] In the British Steel case,[25] for example, the immediate cause of the collapse of the platform was a welder (the victim of this case) and a plater's failure to secure it to a crane or by means of temporary props so that the platform was unstable. Yet, it was alleged that a section engineer in the employment of the company failed to supervise the repositioning operation properly. Either the section engineer or these workers' fault suggests the existence of corporate collection or judgment errors and, thus, there is little room for arguing the issue of causation.[26]

However, Nishihara's subgroup of vertical concurrence of plural faults based on the timeframe (1-1) and of cumulative coexistence of plural faults (2-3) may provide certain conditions on which the chain of causation can be broken. Take a fire accident case as an example. In the Welansky case,[27] the defendant individual who owned a night club was held liable for manslaughter that resulted both from insufficient exit doors and from his use of defective wiring and inflammable decorations in the night club. The immediate cause of the fire at issue was, however, a sixteen year old bartender's mishandling of a match, which he used in order to light the bulb. Since both

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24 The Law Commission may be of the similar opinion that the company's management failure may, in some cases, consist in a failure to take precautions against its employee's error. That is, the relationship between the company's management failure and the employee's error is "one on top of another." See Law Commission, *Involuntary Manslaughter*, *supra* note 1 at para. 8.37, cited in Chapter 5, text accompanying note 160.

25 [1995] ICR 586, cited in Chapter 3, text accompanying notes 100-101.

26 These observations hitherto made in relation to Nishihara's subgroups 1-2 (horizontal or temporal concurrence), 2-1 (mere unrelated coincidence of faults) and 2-2 (plied up or one on top of another) would not, of course, apply in cases in which *both* individual faults are not concerned with the relevant corporate operations to the risk. As for mixed cases of 2-3 (cumulative coexistence) and 1-1 (vertical coexistence) in which a causal link between corporate errors and the result can be broken, see *infra* text accompanying notes 27-32.

27 (1944) 55 N.E.2d 902, cited in Chapter 3, text accompanying notes 47-56. See, in particular, Chapter 3, n.55.

the owner and bartender's faults were concerned with the same risk-involving operation of the company (namely, the running of the overcrowded night club), it is difficult to regard either fault as an intervening cause of the result. However, if the immediate cause of the fire was the third party's act (for example, a terrorist's arson) or an "act of God" (for example, lightning), a causal link between the owner's fault and the result would be broken.

Similarly, in the Fire Accident in Hotel New Japan case,[28] the immediate cause of the fire that occurred in the hotel was the guest's smoking in bed. All the hotel could do to prevent the fire from *occurring* in this case was to warn the guests by notice boards that "Smoking in bed is strictly forbidden," so that it is difficult to find any fault on the part of the hotel concerning the immediate cause of the fire. The owner of the hotel was accused of his failure "to design a fire prevention or fighting plan, to carry out periodic dire drills based on the plan, to check and maintain fire fighting equipment and to operate them effectively" in case of fire.[29] At the time when the guests were invited to the hotel, however, his failures mentioned above produced no risk of *actual* harm to them. As far as the conduct requirement is concerned, his failures would correspond to criminal omissions,[30] which nevertheless had no connection to the cause of fire.

In such cases as fire accidents at the building or hotel, it cannot be denied that fire in a place of public facility is "an ever present danger."[31] However, it does not follow that proof of a causal link between the result and the failure to prevent the occurrence of a fire from causing the result, rather than the failure to prevent a fire from occurring, is "enough [for the defendant's criminal responsibility] .... in the event of fire from any cause."[32] This is particularly so when the fire at issue was caused by the third

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28 Tokyo District Court, 20 May 1987, 1244 *Hanrei Jiho* 36, cited in Chapter 5, text accompanying notes 59-60.

29 Chapter 5, text accompanying note 62.

30 See Chapter 5, text accompanying note 71.

31 Commonwealth v. Welansky (1944) 55 N.E.2d. 902 at 912, cited in Chapter 3, text accompanying note 54.

32 *Ibid.*

party's fault. Such a hypothetical case would belong to the category of Nishihara's subgroups 1-1 (vertical concurrence of faults based on the timeframe) or 2-3 (cumulative coexistence of faults) in which *either* individual fault is not related to any corporate errors of the risk of actual harm, so that the corporation should be granted a defence that negates its liability.

6.2.2. Foresight of the Risk

In analysing several cases of corporate manslaughter, Chapter 3 illustrated some common features of corporate fault. In cases of fire accidents just mentioned above, for example, a corporation's fault should be located both in corporate failure to control or minimise the cause of fire (the source of risk) to prevent its occurrence and in corporate failure to establish a safety system to prevent the occurrence of the fire from causing the result. For the defendant corporation to be held liable for manslaughter, therefore, it must be proved that the risk of harm required to be aware of by the corporation (in cases of recklessness) or to be obvious to a reasonable person (in cases of gross carelessness) resulted both from the former (failures to prevent the risk from occurring) and from the latter (failures to prevent the occurrence of the risk from causing the result). In other words, proof that the corporation was aware of or capable of appreciation of both "risk-producing factors" in its activities (in cases of the former type of failures) and "the absence of risk-preventing factors" in its subsequent (in)actions (in cases of the latter type of failures) is necessary for corporate liability for manslaughter.[33]

Two points need to be emphasised as to the above classification of the types of

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[33] The name of each word is based on the translation of Japanese words used in Y. Ōtsuka, "Yoken-Kanōsei no Handan Kōzō to Kanri-Kantoku Kashitsu (Structural Judgments on the Issue of Foreseeability and Supervisory Fault)" (1997) 36 *Keiho Zasshi* 359 at pp. 367-374.

Under the risk-oriented theory, the corporation's awareness of the risk at issue is, on the one hand, determined by assessment errors made by corporate decision-making officers who have, in their directorial capacity, choices to make decisions to take risk-averting actions. The former type of corporate awareness (= failures to prevent the risk from occurring) may result from their underestimation of the extent of the risk, while the latter type of corporate awareness (= failures to prevent the occurrence from causing the result) from their overestimation of the effectiveness of the subsequent risk-averting actions.

In cases of the corporation's gross carelessness, on the other hand, corporate capacities for appreciation of both types of risk-relating factors (namely, risk-producing factors and the absence of risk-preventing factors) are considered so as to determine whether there existed collection, transaction and/or judgment errors at the material time.

risk-relating factors. Firstly, in cases of reckless manslaughter, it must be proved that the defendant, whether corporate or individual, was aware of both factors: if it is proved that the defendant was only aware of either factor, then the liability of reckless manslaughter should be denied. Instead, the liability of manslaughter by gross carelessness may apply if the defendant was grossly careless of the other factor. Secondly, if neither factor was obvious to a reasonable person and/or was capable of appreciation by the defendant, then the defendant could not be held liable even for manslaughter by gross carelessness.

In such cases of corporate manslaughter as Denbo,[34] McIlwain School Bus[35] and Fortner LP Gas,[36] both risk-relating factors were located very closely. The sources of risks in these cases were defective vehicles which had been used by the companies for the relevant operations, and their awareness of the defectiveness of the vehicles would *automatically* prove their awareness of the absence of preventing factors of the risk that resulted from the defective vehicles. The Ebasco[37] and British Steel cases may provide a similar example in which the construction work (in the Ebasco case) or repositioning operation (in the British Steel case) was "inherently dangerous."[38] Since the source of risk is often inherent in this kind of operation, once the risk materialises it is difficult or almost impossible to prevent the occurrence of the risk from causing the result. In these cases, therefore, the offender's foresight of the risk-producing factors inevitably absorbs that of the absence of risk-preventing factors.

The same observation should hold true of the Serebin case[39] in which the court held that the causal link between the victim's death and a nursing home administrator's reckless conduct both in admitting the increasing number of patients and in reducing the

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34 Chapter 3, text accompanying note 22.

35 Chapter 3, text accompanying notes 116-118.

36 Chapter 3, text accompanying note 119.

37 (1974) 354 N.Y.S.2d 807, cited in Chapter 3, text accompanying note 23.

38 [1995] ICR 586 at 588.

39 (1983) 338 N.W. 2d. 855; (1984) 350 N.W. 2d. 65, cited in Chapter 3, text accompanying notes 43-44.

nursing staff was not proved. The staffing shortage was alleged to make it impossible for the staff on duty to make the ideal two-hour bed check, but it was held that the victim died of exposure to the cold so soon that even the ideal two hour bed check could not have prevented his death. The mistake the court made in this case was in requiring both factors (risk-producing and risk-preventing) to be causally linked to the result *separately*. In this case, the source of risk was the victim's tendency to walk out of the nursing home *at any time*. In addition, the defendant's failure to prevent the source of risk from materialising, namely, his failure to install alarms on the relevant doors to alert the reduced nursing staff when they were opened, *automatically* led to the subsequent situations in which even the ideal two-hour bed check could not prevent the victim's death. Thus, it was immaterial whether the ideal two-hour bed check could have prevented the victim's death as long as the defendant's initial failure was, *in due course*, causally linked to the result and he was aware of the victim's tendency to walk out of the home.

However, in cases where there exists a certain time span between the occurrence of risk-producing factors and that of risk-averting factors, it is possible to take into consideration the defendant's reasonable reliance upon the existing effective risk-averting systems. In the cases of O'Neil[40] and Chicago Magnet Wire[41], certain occupational hazards such as the proliferation of poisonous substances were inherent in the manufacturing process. The corporations in these cases were actually accused of failing to take effective measures to reduce the risks of harms to workers. Assume that in these cases, adequate remedial action is taken by the corporations to modify dangerous working conditions at the factory (for example, the issue of poisonous gas), in terms of supplying safety equipment and effective ventilation to workers, but it is nevertheless proved that these risk-averting systems do not operate due to the victim's personal fault or the third party's intentional conduct. For example, the victim (one of the workers) is, despite the company's instructions, so careless in handling his face mask designed to prevent him from inhaling the poisonous gas that it is damaged; or a third

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40 (1990) 550 N.E.2d.1090, cited in Chapter 3, text accompanying notes 60-67.

41 (1987) 510 N.E.2d.1173; (1989) 534 N.E.2d.962, cited in Chapter 3, text accompanying note 31.

party (someone outside the company) breaks the factory's ventilation duct so that the factory reeks of poisonous gas.

In these hypothetical examples, it can be said that the corporation is aware of the risk-producing factors (the inherence of the source of risk in the particular operation), but not of the absence of the risk-averting factors. Therefore, the corporation should be granted a defence on the ground of the absence of foresight or, on some occasions, the absence of foreseeability of the risk at issue.[42]

6.2.3. Avoidability of the Risk

In cases where it is proved that the risk (or the result) at issue could not reasonably be avoided, the liability of the defendant should be denied. If, for example, a father who could not swim found his son drowning in a river, and no one was available for the father to ask to rescue his son, it would be difficult to blame the father for his failure to rescue his son despite his awareness of the risk. This is because no effective risk-averting measures were available to him. When gross carelessness is the requisite fault element of an offence of manslaughter, foreseeability of the risk is the only factor in determining whether or not the risk could be avoided, since, as referred to in the previous chapter,[43] foresight of the risk at issue is part of risk-averting measures.

The Law Commission has recommended that in cases of individual manslaughter

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[42] See clause 17 of the Law Commission's Draft Criminal Code Bill 1989 (Law Commission No.177), providing that:

(1) Subject to subsections (2) and (3), a person causes a result which is an element of an offence when -
(a) he does an act which makes a more than negligible contribution to its occurrence; or
(b) he omits to do an act which might prevent its occurrence and which he is under a duty to do according to the law relating to the offence.

(2) A person does not cause a result where, after he does such an act or makes such an omission, an act or event occurs -
(a) which is the immediate and sufficient cause of the result;
(b) which he did not foresee, and
(c) which could not in the circumstances reasonably have been foreseen.

It is obvious that Law Commission, unlike this thesis position, treats this issue as part of causation. Nonetheless, given clause 17(2), the practical difference between Law Commission and this thesis positions is of little importance.

[43] Chapter 5, text accompanying note 82.

by gross carelessness, the risk at issue must be capable of appreciation by the defendant. The reason for this is explained as follows:

> "Since the fault of the accused lies in her failure to consider a risk, she cannot be punished for this failure if the risk in question would never have been apparent to her, no matter how hard she thought about the potential consequences of her conduct. If this criterion is not insisted upon, the accused will, in essence, be punished for being less intelligent, mature or capable than the average person."[44]

It follows from the above extract that it is the intellectual, mental and physical capacities of the defendant, not those of the average person, which ought to be considered to address the issue of whether the risk could be foreseen to him/her. These personal capacities should also be considered in cases of reckless manslaughter in order to determine whether or not the risk could be avoided despite his/her awareness of it. The need for considering the defendant's personal capacities concerning the risk should be emphasised, particularly when his/her conduct itself is lawful and has a certain degree of social utility.[45]

In cases of a corporate defendant, too, account needs to be taken of its material, financial technical and human resources that should be used to take necessary and reasonable risk-averting actions.[46] That is, if it is proved that the corporation had no or insufficient financial or material resources to detect the risk in its activity and/or to take necessary risk-averting actions,[47] the corporation should be granted a defence of

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44 Law Commission, *Involuntary Manslaughter*, *supra* note 1 at para. 4.20.

45 See Chapter 5, text accompanying note 46.

46 See Chapter 5, text accompanying note 77.

47 This point is argued in S. Field & N. Jörg, "Corporate Liability and Manslaughter: Should We Be Going Dutch" [1991] *Criminal Law Review* 156, referring to the Dutch criminal law's doctrine of corporate "power" to prevent the possibility of harmful consequences and corporate "acceptance" of them as useful criteria applicable to English law. For the details of this doctrine, see also N. Jörg, "The Promise and Limitations of Corporate Criminal Liability" in W.S. Lofquist, M.A. Cohen & G.A. Rabe (eds.), *Debating Corporate Crime* (1997, Academy of Criminal Justice Sciences, Kentucky), pp. 99.

It may be argued that the corporation should not engage in a particular risk-involving operation in the first place unless it has sufficient resources to detect the probable risk. However, as discussed in Chapter 5 (text accompanying note 84), it is difficult to assume that the defendant corporation could be expected to avert or minimise the risk without its awareness, perception or foresight of the risk. It is also dificult to expect the corporation to take all-out efforts to detect any risks involved or inherent in its operation before engaging in it. In the P & O case (cited in Chapter 3, text accompanying notes 72-82), for example, the risk at issue was the ferry put to sea

unavoidability of the risk. A difficult issue to be dealt with here is how to delineate the appropriate circumstances in which the risk can or cannot reasonably be said to be avoided in the context of corporate manslaughter.

For this issue to be resolved, reference to Spurgeon and Fagan's useful analysis of the types of the risk in relation to corporate blameworthiness may prove helpful.[48] In determining the degree of corporate blameworthiness, Spurgeon and Fagan address two questions concerning the types of the risk involved in corporate activities: whether the risk at issue is discoverable; and where it is, whether the risk can be avoided and at what cost.[49] As for the first question, Spurgeon and Fagan insist that:

> "Society would not morally condemn corporations and individuals for creating an unknown and unforeseeable risk. However, corporations must have a duty to take all reasonable precautions to discover the risk. If a corporation rushes production of a particular item without thoroughly testing for and solving faults that may cause injury, the corporation may be subject to moral blame."[50]

As discussed in Section 5.5. of the previous chapter, the corporation's failure to discover the risk is not limited to cases in which it "rushes production of a particular item without thoroughly testing for and solving faults." It may also result from its failures to employ

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with its bow doors open, but, as Sullivan correctly suggests (*Guilt*, *supra* note 6 at 290), "it cannot be grossly negligent nowadays to operate a ro/ro ferry *per se*, even though, as everone now knows, the most dangerous treat to life comes from the very nature of the vessel itself."

48 W.A. Spurgeon & T.P. Fagan, "Criminal Liability for Life-Endangering Corporate Conduct" (1981) 72 *Journal Criminal Law and Criminology* 400 at pp. 412-420.

49 *Ibid.* at pp. 416-417. The first question may correspond to, under the risk-oriented theory, whether there exist corporate collection, transaction or/and judgment errors to perceive the risk, whilst the second question to whether there exist assessment errors to avoid the risk.

50 *Ibid.* at 416. An example of the case in which "a corporation rushes production of a particular item without thoroughly testing for and solving faults that may cause injury" has been presented by Spurgeon and Fagan (*ibid.* at 416, n.76) by referring to the case of "Firestone 500" (cited from US Subcommittee on Crime of the Committee of the Judiciary, House of Representatives, 96th Congress, 2nd Session, *Corporate Crime* (1980, US Government Printing Office, Washington) [hereinafter cited as *Corporate Crime*], pp. 3-8) as follows:

> "The Firestone radical 500 tire incidents present a possible example of such blame. While all American tire manufacturers experienced some development problems with producing radial tires, Firestone was the first company to market such a tire. Firestone itself experienced more difficulty with the 500 tire than with other steel-belted radials, which it took more time to develop. Firestone accepted back more 500 tires from its customers and settled more claims involving the 500 than it did for its other steel-belted radials.... Thus, it may be inferred that the 500 tire's problems stemmed in part from rushing the tire into production before solving technological problems. [Footnote omitted]"

competent staff (collection errors), to establish liaison between top management and workers (transaction errors) and/or to judge the existence of the risk properly (judgment errors). Since this issue was already addressed, the second question posed by Spurgeon and Fagan will be dealt with here.

In addressing the second question, Spurgeon and Fagan attempt to distinguish between morally blameworthy corporate conduct and excusable conduct by using their unique balance considerations between benefit (which the relevant corporate activity supply to society) and harm (which it does to society).[51] Corporate conduct that should be viewed as blameworthy can be found (1) when a corporation fails to prevent cheaply avoidable risks, or (2) when it poses a great degree of danger but still costs a great deal to avoid. An example of the type (1) is presented by Spurgeon and Fagan as follows:

> "[C]onstruction laborers working at great heights are exposed to the possibility of injury upon falling. Scaffolding and safety lines greatly reduce this risk. As compared to the value of a life or the economic cost scaffolding adds to the construction project, failure to provide safety devices would represent an unjustified disregard for human life, because the harm of the conduct (death or serious injury) would be disproportionate to the benefit (economic reduction in cost of buildings constructed without the use of safety devices)." [Footnote omitted][52]

Several corporate manslaughter cases examined in Chapter 3 may fall into this first type of morally blameworthy corporate conduct categorised by Spurgeon and Fagan. In the P & O case, for example, the risk at issue could have been avoided if "an inexpensive electrical device had been fitted to P & O ferries."[53] The same is true of the Serebin case in which the risk of harm to the nursing home's resident could have been avoided if alarms had been installed on each door of the building. Similarly, in the cases of Denbo, McIlwain School Bus, Fortner LP Gas, the risk of harm to the victim(s) could

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51 Spurgeon & Fagan, *supra* note 48 at pp. 416-418.

52 *Ibid.* They also refer to the Ebasco case ((1974) 354 N.Y.S.2d. 807) as falling into this category. *Ibid.* at 417, n.78.

53 Sullivan, *Attribution*, *supra* note 6 at 542 (referred to in Chapter 5, n.96). See also Field & Jörg, *supra* note 47 at pp 170-171, insisting that:

> "Collective management response to several requests by Masters for bow-door indicator lights was at best casual. They made no attempts to assess the effectiveness of existing monitoring procedures. If they had been, management would surely have uncovered the previous failures in the system.... They had the power to install indicator lights or otherwise change procedures to prevent the recurrence of the problem."

have easily been avoided if the vehicle at issue had been properly maintained by the corporation.

An example of the type (2) is presented by Spurgeon and Fagan by reference to the Buffalo Creek incident,[54] in which the collapse of a dam in Buffalo Creek, West Virginia, claimed 125 lives of people who lived in this area, and destroyed a thousand homes. A mining company was engaged in the mining process that produced slag - a wide assortment of waste materials - and liquid waste for disposal. For the water to be available for future use, the impurities needed to be settled out of it, so that the company dumped new slag on top of old to form a barrier behind which the water could be stored and reused. Eventually, the dam collapsed and the 132 million gallons of waste water and solids roared through the breach.

Two unique balance considerations are given by Spurgeon and Fagan to this case: one between the benefit of the company's mining activity to society and its harm; and the other between the harm and the amount of the corporation's settlement.

> "The harm of the mining company's conduct was death and destruction of property. The benefit of the activity to society at large was the production of coal. The inhabitants of the Buffalo Creek area benefited from the use of streams not directly contaminated by the company's liquid effluent. The coal company benefited from being able to dispose of its slag while retaining waste for later use in the mining process. In balancing the proportionality of these benefits against the harm, the danger was disproportionate to the benefit received by the coal company. When the destruction of a community is at stake, the risk should be avoided. In 1974, the company settled a damage suit for thirteen-and-a-half million dollars. Instead of paying damages, the company could reasonably have used these monies [*sic*] to reinforce the dam or to find an alternate means of storing waste water. The company's failure to do so was unjustified and therefore blameworthy." [Footnotes omitted][55]

This type of morally blameworthy corporate conduct is also found in cases such as Kite examined in Chapter 3, in which the danger to school children posed by the company was disproportionate to the benefit to society (running the outdoor leisure activities), O'Neil, Chicago Magnet and Warner-Lambert,[56] in which the danger to workers

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54 The facts of this case are drawn from US Subcommittee, *Corporate Crime*, *supra* note 50 at pp. 1-3.

55 Spurgeon & Fagan, *supra* note 48 at 418.

56 (1980) 414 N.E.2d. 660, cited in Chapter 3, text accompanying notes 57-58.

(namely, poisonous working conditions) was disproportionate to the benefit to society (manufacturing products). The same can be said of the cases of Welansky (in which the construction of more exit doors might have been costly to the owner of the night club, but the danger of the occurrence of a fire to a number of patrons was clearly disproportionate to the benefit to society (running the night club)) and Van Schaik[57] (in which the danger of harm to passengers of the vessel was disproportionate to the benefit to society (the navigation of vessels)).

As for the the category of corporate conduct which should be viewed by Spurgeon and Fagan as excusable, it may be found in cases where the harm the corporation does to society is not necessarily disproportionate to its benefit.[58] An example of this category is presented by them as follows:

> "The health hazards associated with asbestos and vinyl chloride used in the manufacturing process illustrate this kind of behavior. Asbestos has more than three thousand commercial applications, but is also associated with significant health risks. Similarly, the vinyl chloride industry accounted for one percent of the gross national product in 1976, yet this chemical has been associated with liver cancer in workers and with birth defects.
>
> The substances present the harm of death or serious illness. However, society gains the benefit of using fire-resistant products and items containing plastic. In this case, the harm may not necessarily be disproportionate to the benefit. Here we are confronted with the conflicting social goals of valuing human life and of social progress. No life should be sacrificed needlessly, but taking some risks may be a constituent part of society. If manufacturers adhere to standards which reasonably protect the health of workers, their conduct cannot be so unjustified as to warrant moral blame simply on the basis of a cost/health balancing test. [Footnotes omitted]"[59]

As Spurgeon and Fagan observe, corporate conduct has simultaneous beneficial and detrimental effects upon our modern life. On the one hand, it supplies modern society with "our transportation vehicles, process[es] the food we eat, construct[s] the buildings in which we live ...., make[s] a myriad of goods we use everyday ...., provides employment and also affects our environment."[60] On the other hand, it also endangers the health of customers by selling unsafe cars, drugs and foods, poses life and health

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57 (1904) 134 F. 592, cited in Chapter 3, text accompanying notes 92-93.

58 Spurgeon & Fagan, *supra* note 48 at pp. 418-419.

59 *Ibid.*

60 *Ibid.* at 400.

risks to industrial workers by hazardous working conditions and toxic chemicals used in the manufacturing process, and threatens public health by water and air pollution and the dumping of toxic chemicals.[61] Since the use of criminal law for holding a corporation criminally liable for manslaughter involves "the challenge of curtailing [the corporation's] socially harmful activity without stifling the industrial process,"[62] balance considerations presented by Spurgeon and Fagan between the benefit of the relevant corporate activity to society and its harm are inevitable.

Viewed in this light, it is difficult to deem the corporation's risk-taking actions or its insufficient risk-averting systems to be unreasonable or to fall far below what can reasonably be expected in the circumstances in which the harm caused by the relevant activity is not disproportionate to the benefit to society. In such cases, therefore, the corporation should be granted a defence of unavoidability of the risk.

6.3. An Overview of the Organizational Sentencing Guidelines

In addressing the issue of what should be considered to be aggravating or mitigating factors at sentencing for corporate defendants the Organizational Sentencing Guidelines[63] which took effect on 1 November 1991 in the US may provide a starting-

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61 *Ibid.*

62 *Ibid.*

63 US Sentencing Commission, *Sentencing Guidelines Manual* (1998, ch.8, available through http://www.ussc.gov./) [hereinafter cited as *Guidelines*]. For detailed arguments of the Guidelines, particularly its ch.8, see generally, Rakoff, Blumkin & Sauber, *supra* note 8; R. Gruner, *Corporate Crime and Sentencing* (1994, Michie Co, Virginia) [hereinafter cited as *Corporate Crime*], chs. 8-12, "Towards an Organizational Jurisprudence: Transforming Corporate Criminal Law through Federal Sentencing Reform" (1994) 36 *Arizona Law Review* 407, "Just Punishment and Adequate Deterrence for Organizational Misconduct: Scaling Economic Penalties under the New Corporate Sentencing Guidelines" (1992) 66 *Southern California Law Review* 225 [hereinafter cited as *Just Punishment*] and "Beyond Fines: Innovative Corporate Sentences under Federal Sentencing Guidelines" (1993) 71 *Washington University Law Quarterly* 261 [hereinafter cited as *Beyond Fines*]; B.T. Thompson & J.P. Carty, *SOS - Navigating the New Corporate Sentencing Guidelines* (1992, National Association of Manufacturers, Washington D.C.); J. Moore, "Corporate Culpability under the Federal Sentencing Guidelines" (1992) 34 *Arizona Law Review* 743; D.K. Webb, S.F. Molo & J.F. Hurst, "Understanding and Avoiding Corporate and Executive Criminal Liability" (1994) 49 *Business Lawyer* 617; D.K. Webb & S.F. Molo, "Some Practical Considerations in Developing Effective Compliance Programs: A Framework for Meeting the Requirements of the Sentencing Guidelines" (1993) 71 *Washington University Law Quarterly* 375; E.H. Miller III, "Federal Sentencing Guidelines for Organizational Defendants" (1993) 46 *Vanderbilt Law Review* 197; M. Tonry, "Sentencing Commission and their Guidelines" (1993) 17 *Crime & Justice - A Review of Research* 137; I.H. Nagel & W.M. Swenson, "The Federal

point. This section is devoted to outlining the Guidelines.

The Guidelines consist of two major parts: the general application principles of the Guidelines and the determination of the fine under the Guidelines. The Sentencing Reform Act of 1984 provided several criminal sanctions against corporations, such as criminal forfeiture, probation, restitution, orders of notice to victims and community service.[64] Pursuant to the Act, the Guidelines specify the detailed application principles of these sanctions. "Introductory Commentary" of the Guidelines states that:

> "As a general principle, the court should require that the organization take all appropriate steps to provide compensation to victims and otherwise remedy the harm caused by or threatened by the offense. A restitution order or an order of probation requiring restitution can be used to compensate identifiable victims of the offense. A remedial order or an order of probation requiring community service can be used to reduce or eliminate the harm threatened, or to repair the harm caused by the offense, when that harm or threatened harm would otherwise not be remedied. An order of notice to victims can be used to notify unidentified victims of the offense."[65]

Under the Guidelines, probation is ordered by the court if necessary to safeguard the corporation's ability to pay a monetary penalties (such as restitution, fine or special assessment), or to ensure that changes are made within the corporation to reduce the likelihood of future criminal conduct or to have an effective program to prevent and detect violation of law.[66] The court may also order the corporation to give reasonable

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Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts about their Future" (1993) 71 *Washington University Law Quarterly* 205; J.S. Parker, "Rule without...: Some Critical Reflections on the Federal Corporate Sentencing Guidelines" (1993) 71 *Washington University Law Quarterly* 397; E.J. Zagrocki, "Federal Sentencing Guidelines: The Key to Corporate Integrity or Death Blow to Any Corporation Guilty of Misconduct?" (1992) 30 *Duquesne Law Review* 331; R.J. Maurer, "The Federal Sentencing Guidelines for Organizations: How Do They Work and What Are They Supposed to Do?" (1993) 18 *University of Dayton Law Review* 799; J.W. Nunes, "Organizational Sentencing Guidelines: The Conundrum of Compliance Programs and Self-Reporting" (1995) 27 *Arizona State Law Journal* 1039.

64 18 U.S.C. §§3551, 3553-3556.

65 US Sentencing Commission, *Guidelines*, *supra* note 63, §8, Part B.

66 The Guidelines, *ibid.*, §§8D1.1. and 8D1.4.(c). Pursuant to the Sentencing Reform Act (18 U.S.C. §§3555 and 3563), §§8D1.3.-1.4. of the Guidelines also provides several other conditions of probations as follows: (1) the organisation shall not commit another federal, state or local crime during the term of probation (§8D1.3.(a)); (2) the court may order the organisation to publicise, at its own expense, the nature of its offence, its conviction and the step it will take to prevent similar offences in the future(§8D1.4.(a)); (3) the organisation is required to make periodic reports on its financial conditions, results of business operations and accounting for the disposition of all

notice and explanation of the conviction to victims of the offence by mail, by advertising in a specific area or through specific media, or by other appropriate means.[67] A remedial order or community service is to be imposed as a condition of probation in order for the corporation to remedy or repair the harm caused by the offence, and to eliminate or reduce the risk that the instant offence will cause future harm.[68] Finally, the court may enter a restitution order for the *full* amount of the victim's loss and, if necessary, can also reduce the fine to the extent that imposition of such fine would impair the corporation's ability to make restitution to victims.[69] It is obvious that prior consideration is given by the Guidelines to restitution among these sanctions.[70]

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funds received to a probation officer (§8D1.4.(b)(1)); (4) it is also required to submit to unannounced examinations of its books and records, and to interrogation of knowledgeable individuals (§8D1.4.(b)(2)); (5) the court may order the organisation to inform the court or probation officer of any adverse changes in its business or financial conditions; and (6) the court is authorised to impose other conditions that "are reasonably related to the nature and circumstances of the offence or the history and characteristics of the organization" and "involve only such deprivations of liberty or property as are necessary to effect the purposes of sentencing" (§8D1.3.(c)).

67 *Ibid.*, §8B1.4, §5F1.4.

68 *Ibid.*, §§8B1.2, 1.3.

69 *Ibid*, §§8B1.1(1) and 8C3.3(a).

70 This has been followed by Law Commission, *Involuntary Manslaughter*, *supra* note 1, paras. 8.72-8.76. A close study of corporate punishment is beyond the scope of this thesis. On this subject, see, for example, Gruner, *supra* note 63, *Corporate Crime*, ch.12 and *Beyond Fine*, D. Bergman, "Corporate Sanctions and Corporate Probation" (1992) *New Law Journal* 1312; J. Braithwaite, "Enforced Self-Regulation: A New Strategy for Corporate Crime Control" (1982) 80 *Michigan Law Review* 1466; J.C. Coffee, ""No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment" (1981) 79 *Michigan Law Review* 386 [hereinafter cited as *An Unscandalized Inquiry*] and "Making the Punishment Fit the Corporation: The Problems of Finding an Optimal Corporate Criminal Sanction" (1980) 1 *Northern Illinois University Law Review* 3; J.C. Coffee, R. Gruner & C.D. Stone, "Standards for Organizational Probation: A Proposal to the United States Sentencing Commission" (1988) 10 *Whittier Law Review* 77; J. Gobert, "Controlling Corporate Criminality: Penal Sanctions and Beyond" (1998) *Web Journal of Contemporary Legal Issues*; M.H. Levin, "Corporate Probation Conditions: Judicial Creativity or an Abuse of Discretion?" (1984) 52 *Fordham Law Review* 637; W.S. Lofquist, "Legislating Organizational Probation: State Capacity, Business Power, and Corporate Crime Control" (1993) 27 *Law & Society Review* 741; J.B. McAdams, "The Appropriate Sanctions for Corporate Criminal Liability: An Eclectic Alternative" (1978) 46 *Cincinnati Law Review* 989; J.S. Parker, "Criminal Sentencing Policy for Organizations: The Unifying Approach of Optimal Penalties" (1989) 26 *American Criminal Law Review* 513 [hereinafter cited as *The Unifying Approach*]; F.L. Rush, "Corporate Probation: Invasive Techniques for Restructuring Institutional Behavior" (1986) 21 *Suffolk University Law Review* 33; G. Slapper, "Corporate Punishment" (1994) 144 *New Law Journal* 29; C.A. Wray, "Corporate Probation under the New Organizational Sentencing Guidelines" (1992) 101 *Yale Law Journal* 2017; B. Fisse, "Community Service as a Sanction against Corporations" (1981) *Wisconsin Law Review* 970, "Reconstructing Corporate Criminal

In determining the fine, the Guidelines provide interesting guidance consisting of "base fine," "culpability score," and "minimum and maximum multipliers."[71] At first, the base fine is determined in one of the following three ways, whichever results in the highest amount:[72] it may be set at the amount of pecuniary gain obtained by the organisation from the offence; it may be set at the amount of pecuniary loss from the offence caused by the organisation, to the extent that the loss was caused intentionally, knowingly, or recklessly; and in cases in which neither pecuniary gain nor loss are high sufficiently to reflect the severity of the offence adequately, the court is directed to chapter two of the Guidelines, where the "Offense Level Fine" is determined according to each crime's seriousness.[73] Commentary to the Guidelines states that:

Law: Deterrence, Retribution, Fault and Sanctions" (1983) 56 *Southern California Law Review* 1140, "Sanctions against Corporations: The Limitations of Fines and the Enterprise of Creating Alternatives" in B. Fisse & P.A. French (eds.), *Corrigible Corporations and Unruly Law* (1985, Trinity University Press, San Francisco) and "Sentencing Options against Corporations" (1990) 1 *Criminal Law Forum* 2111; B. Fisse & J. Braithwaite, *The Impact of Publicity on Corporate Offenders* (1983, State University of New York Press, Albany); C.D. Stone, *Where the Law Ends: The Social Control of Corporate Behavior* (1975, Evanston, New York).

71 *Guidelines*, *supra* note 63, §§8C2.4, 2.5, and 2.6. The following figure may be helpful in understanding the whole process of determining the fine under the Guidelines.

Determining the Fine within the Range

Base Fine × Minimum or Maximum Multipliers = Guideline Fine Range

Culpability Score

Departure from the Range

72 *Ibid.* §8C2.4(a).

73 "Offense Level Fine Table" is provided in *ibid.*, §8C2.4(d) as follows:

Offense Level	Amount ($)	Offense Level	Amount ($)
6 or less	5,000	23	1,600,000
7	7,500	24	2,100,000
8	10,000	25	2,800,000
9	15,000	26	3,700,000
10	20,000	27	4,800,000
11	30,000	28	6,300,000
12	40,000	29	8,100,000
13	60,000	30	10,500,000
14	85,000	31	13,500,000
15	125,000	32	17,500,000
16	175,000	33	22,000,000
17	250,000	34	28,500,000
18	350,000	35	36,000,000
19	500,000	36	45,500,000
20	650,000	37	57,500,000
21	910,000	38 or more	72,500,000
22	1.200,000		

The offence level is attached to each offence provided in §2 of the Guidelines. To take homicide

> "As a general rule, the base fine measures the seriousness of the offense. The determinants of the base fine are selected so that, in conjunction with the multipliers derived from the culpability score in §8C2.5 (Culpability Score), they will result in guideline fine range appropriate to deter organizational criminal conduct and to provide incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting crimina conduct. In order to deter organizations from seeking to obtain financial reward through criminal conduct, this section provides that, when greatest, pecuniary gain to the organization is used to determine the base fine. In order to ensure that organizations will seek to prevent losses intentionally, knowingly, or recklessly caused by their agents, this section provides that, when greatest, pecuniary loss is used to determine the base fine in such circumstances."[74]

The gain and the loss from the offence mentioned above are limited to pecuniary ones, but the calculation of these factors is not to be used if it would "unduly complicate or prolong the sentencing process".[75]

The culpability score considered next under the Guidelines is an index that exhibits the degree of the defendant corporation's culpability. The culpability score starts with five points, and increases to as high as ten or decreases to as little as zero by the existence of aggravating or mitigating factors. Aggravating factors that affect the score consist of: (1) the number of employees the corporation has (the higher the number, the more aggravating the corporate sentencing), (2) the involvement of "high-level personnel" or "substantial authority personnel" of the corporation in the offence in question, (3) the existence of the corporation's criminal, civil or administrative adjudication based on similar past misconduct, (4) the fact that the commission of the offence in question violated a judicial order or injunction, or a condition of probation, and (5) the corporation's willful or knowing obstruction of justice during the investigation, prosecution or sentencing of the offence in question.[76] Mitigating factors

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as an example (§2A), first degree murder (§2A1.1) - 43; second degree murder (§2A1.2) - 33; voluntary manslaughter (§2A1.3) - 25; involuntary manslaughter (§2A1.4) - 14 (recklessness), - 10 (criminal negligence); conspiracy or solicitation to commit murder (§2A1.5) - 28.

74 *Guidelines, supra* note 63, §8C2.4., "*Background.*"

75 *Ibid.*, §8C2.4(c).

76 *Ibid.*, §8C2.5(a)-(e). The term "high-level personnel" of the organisation is defined in *ibid.*, §8A1.2. (Commentary, Application Notes 3(b)) as:

> "individuals who have substantial control over the organization or who have a substantial role in the making of policy within the organization",

including:

> "a director; an executive officer; an individual in charge of major business of functional unit of the organization, such as sales, administration, or finance; and an individual with

are the following two: (1) the existence of an effective program to prevent and detect violations of law (as well as the fact that high-level or substantial authority personnel were *not* involved in the offence in question); and (2) the corporation's self-reporting of the offence to appropriate governmental authorities, full cooperation in the investigation, and/or clear demonstration of recognition and affirmative acceptance of responsibility of its criminal conduct prior to an imminent threat of disclosure or government investigation and within a reasonably prompt time after becoming aware of the offence.[77]

Finally, the base fine is multiplied under §8C2.6. (Minimum and Maximum

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a substantial ownership interest."

The term "substantial authority personnel" means:

"individuals who within the scope of their authority exercise a substantial measure of discretion in acting on behalf of an organization",

including:

"high-level personnel, individuals who exercise substantial supervisory authority (*e.g.*, a plant manager, a sales manager), and any other individuals who, although not a part of an organization's management, nevertheless exercise substantial discretion when acting within the scope of their authority (*e.g.*, an individual with authority in an organization to negotiate or set price levels or an individual authorized to negotiate or approve significant contracts)."

The Guidelines underscore that whether an individual falls within [either] category must be determined on a case-by-case basis." *Ibid.* Roughly speaking, controlling officers used in the identification principle may belong to the category of "high-level personnel" while high managerial agents used in §2.07(1)(c) of American Model Penal Code (cited in Chapter 4, n.36) may fall into the category of "substantial authority personnel."

The culpability score is determined as a result of a combination of these aggravating factors. For example, if (1) the corporation had more than 5.000 employees and (2) its individual within high-level personnel participated in the offence, five points are added to the original five points according to §8C2.5(b)(1). Moreover, (3) if the corporation committed any part of the offence in question less than 5 years after a criminal adjudication based on similar misconduct, two more points are added under §8C2.5(c)(2)(A). Furthermore, (4) if the commission of the offence violated a judicial order, two more points are added under §8C2.5(d)(1)(A). Finally, (5) if the corporation willfully encouraged obstruction of justice during the investigation of the offence in question, three more points are added according to §8C2.5(3). In the above circumstances, the culpability score is in total 17 points.

77 *Ibid.*, §8C2.5(f)-(g). Under §8C2.5(f), the existence of an effective program to prevent and deter violations of law subtracts three point. §8C2.5(g) provides that: the corporation's self-reporting of the offence, full cooperation in the investigation, and clear demonstration of recognition and affirmative acceptance of responsibility for its criminal conduct subtract five points; its full cooperation in the investigation and clear demonstration of recognition and affirmative acceptance of responsibility for its criminal conduct subtract two points; and only its clear demonstration of recognition and affirmative acceptance of responsibility for its criminal conduct subtracts one point. Aggravating and mitigating factors under the Guidelines will be explored in more detail in the next section.

Multipliers)[78] to reach the organisation's "guideline fine range,"[79] corresponding to its culpability score. For example, if a corporation's base fine is $85,000 (in cases of reckless manslaughter) and its culpability score is five, $85,000 is multiplied by 1.0 and 2.0 to reach a fine range of $85,000 - $170,000. Even after the Guideline fine range is determined, however, factors such as the seriousness of the offence at issue, the organisation's role in the offence, any collateral consequences of conviction (including civil obligations arising from the organisation's conduct), any non-pecuniary loss caused or threatened by the offence, or any prior criminal or civil misconduct by the organisation which were not taken into account in determining the culpability score can be considered by the court in order to avoid an unusually high or low amount of fine.[80]

In unusual cases, departures from the fine range are authorised for several reasons. A downward departure may be warranted in cases in which: (1) the organisation has provided substantial assistance to authorities; (2) it is a public entity; (3) its members or beneficiaries are direct victims of the offence; (4) no individual within substantial authority personnel participated in the offence and the organisation at the time of the offence had an effective program to prevent and detect violations; or (5) the organisation has paid remedial costs arising from the offence that greatly exceed the gain that the organisation received from the offence.[81] A upward departure may be warranted in cases in which: (1) the offence resulted in death or bodily injury, or involved a foreseeable risk of death or bodily injury; (2) the offence constituted a threat

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78 The table provided in *ibid.*, §8C2.6. is as follows:

Culpability Score	Minimum Multiplier	Maximum Multiplier
10 or more	2.00	4.00
9	1.80	3.60
8	1.60	3.20
7	1.40	2.80
6	1.20	2.40
5	1.10	2.00
4	0.80	1.60
3	0.60	1.20
2	0.40	0.80
1	0.20	0.40
0 or less	0.05	0.20

79 *Ibid.*, §8C2.7.

80 *Ibid.*, §8C2.8. (Determining the Fine Within the Range).

81 *Ibid.*, §8C4.1., 4.7., 4.8., 4.9. and 4.11. respectively.

to national security; (3) the offence presented a threat to the environment; (4) the offence presented a risk to the integrity or continued existence of a market; or (5) the organisation, in connection with the offence, bribed or unlawfully gave a gratuity to a public official.[82]

6.4. Sentencing Factors for Corporate Manslaughter

Despite their complexity, the Guidelines provide some useful guidance as to what aggravating or mitigating factors should be considered to determine the degree of corporate culpability and the severity of corporate punishment. The sentencing factors that are enumerated in the Guidelines consist of: (1) the pecuniary gain or loss as a result of the offence a corporation committed; (2) prior history; (3) obstruction of justice and cooperation with authorities; and (4) compliance programs to prevent and detect violations of laws (including (non-)involvement of high managerial officials). The subsequent sections are devoted to examining how these factors can be used under the risk-oriented theory presented in the previous chapter.

6.4.1. Pecuniary Gain or Loss

Under the Guidelines, the underpinning principles for determining the fine consist of the seriousness of the offence ("Offense Level Fine") and the culpability of the corporate defendant.[83] The seriousness of the offence is reflected in its "base fine," which is determined by the pecuniary gain to the corporation from the offence or the pecuniary loss from the offence caused by it. As for the use of the seriousness of the offence in determining the fine, it is of course reasonable to differentiate the amount of fine according to the type of the offence the defendant committed. However, it is not certain why the *pecuniary* gain and loss as a result of the commission of the offence should be one of the fine-setting standards under the Guidelines.

The purposes of the adoption of the pecuniary gain and loss as determinants of the base fine are "to deter organizational criminal conduct and to provide incentives for

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82 *Ibid.*, §8C4.2., 4.3., 4.4., 4.5. and 4.6. respectively.

83 *Ibid.*, ch.8, Introductory Commentary.

organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct", "to deter organizations from seeking to obtain financial reward through criminal conduct", and "to ensure that organizations will seek to prevent losses intentionally, knowingly, or recklessly caused by their agents..."[84] The term "pecuniary gain" is defined in §8A1.2. of the Guidelines as "the additional before- tax profit to the defendant resulting from the relevant conduct of the offense. Gain can result from either additional revenues or cost savings."[85]

Two supporting arguments for using the standard of the pecuniary gain under the Guidelines are provided by Gruner.[86] To begin with, corporate fines should be set sufficiently high, according to the pecuniary gain, to deter most "gain-motivated" or "economically motivated" offences, in order for corporations to be encouraged to monitor the actions of their employees and to incorporate the results of this monitoring into corporate reward and discipline systems. Furthermore, given the fact that detection and prosecution rates of corporate crime are usually low and, accordingly, only a fraction of all corporate offences are punished, it is not only necessary to use the standards for imposing gain-based fines, but also desirable to increase corporate fines to offset the economic benefits of corporate illegal conduct.

However, these arguments are hardly convincing since it is impossible to determine the ideal amount of fine which should be imposed upon offenders so as to

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84 *Ibid.*, §8C2.4., Commentary, Background.

85 *Ibid.*, §8A1.2., Commentary, Application Notes 3(h). Examples given by the Guidelines are as follows:

> "For example, an offense involving odometer tampering can produce additional revenue. In such a case, the pecuniary gain is the additional revenue received because the automobiles appeared to have less mileage, i.e., the difference between the price received or expected for the automobiles with the apparent mileage and the fair market value of the automobiles with the actual mileage. An offense involving defense procurement fraud related to defective product testing can produce pecuniary gain resulting from cost savings. In such a case, the pecuniary gain is the amount saved because the product was not tested in the required manner."

Ibid.

86 Gruner, *Just Punishment*, *supra* note 63 at pp. 236-238.

achieve the maximum deterrent effects.[87] They are also inconsistent when applied in cases of corporate manslaughter, since the pecuniary gain received by a corporation through the commission of manslaughter is not obviously limited to the financial one. Thus, these arguments seem to be nothing more than a claim that low corporate fines cannot deter illegal conduct by corporate employees, and provide little guidance as to whether the standard of the pecuniary gain should be considered in determining the optimal fine.

The use of pecuniary losses suffered by victims in determining the amount of fine is explained differently. According to Gruner,

> "loss-based fines may .... impose "just deserts" for corporate offenses. A sentencing system premised on just-deserts principles imposes punishment to condemn blameworthy offenses. Under this rationale, punishment should mirror the blameworthiness of the offender as measured by the scope of harm involved in an offense and the culpability of the offender. Similarly blameworthy crimes should receive similar sentences; more blameworthy offenses should receive harsher sentences than less blameworthy offenses. [Footnotes omitted]"[88]

It may be true that in cases where corporations are offenders, "corporate offences causing greater victim losses reflect more serious organizational misconduct than those that cause lesser harms. Hence, offenses causing greater losses deserve greater

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87 Gruner suggests that the ideal amount of fine is equal to the amount of illegal benefit obtained from an offence in a situation in which a prosecution rate is 100 percent. Thus, a crime prosecuted in 10 percent should have a fine equal to approximately ten times the gain from that offence. *Ibid.* at 237. This view is sometimes called the "optimal deterrence" or "optimal deterrence based on harm" approach. See, in general, Parker, *The Unifying Approach*, *supra* note 70; Miller III, *supra* note 63; Coffee, *An Unscandalized Inquiry*, *supra* note 70; R.A. Posner, "Optimal Sentences for White-Collar Criminals" (1980) 17 *American Criminal Law Review* 409.

This calculation is, of course, premised upon the fact that the prosecution rate of the offence at issue would never change and, thus, is purely academic. As a result, the relevant statutes providing the amount of fine would unnecessarily be subject to modification according to the result of the annual survey on prosecution rates of numerous offences, which needs to be made to calculate the ideal amount of fine.

88 Gruner, *Just Punishment*, *supra* note 63 at 251 For a full account of just deserts as a basis for criminal punishment, see, in particular, A. von Hirsch, *Doing Justice: The Choice of Punishments - Report of the Committee for the Study of Incarceration* (1976, Hill and Wing, New York) and *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (1985, Rutgers University Press, New Brunswick). In the corporate context, see, for example, A. von Hirsch, "Deserts and White-Collar Criminality: A Response to Dr. Braithwaite" (1982) 73 *Journal of Criminal Law & Criminology* 1164; K. Schlegel, *Just Deserts for Corporate Criminals* (1991, Northeastern University Press, Boston).

condemnation and fines than offenses causing lesser losses."[89] Yet, as Gruner acknowledges, this rationale does not account for the Guidelines' position that the harm which should be reflected in determining the fine is limited to the pecuniary loss suffered by the victim.[90] On the contrary, the Guidelines may be subject to criticism that they may not adequately determine corporate fines to reflect the full seriousness of the offense including non-pecuniary harms such as personal injuries, as is often the case with corporate manslaughter.[91] In addition, the harms, whether pecuniary or not, are already reflected in determining the "offense level"[92] and, accordingly, it may be superfluous to consider the harms in determining the base fine.

6.4.2. Prior History, Obstruction of Justice and Cooperation with Authorities

Unlike the determinants of the base fine discussed above, some factors that are enumerated in relation to the corporate defendant's culpability score under the Guidelines carry reasonable grounds. Prior history and obstruction of justice serve as examples of aggravating factors.[93] Prior misconduct is, for example, one of the most accessible sources of information about an offender's culpability, so that a question of whether s/he is a first offender or a recidivist has been considered crucial to the sentencing of individual offenders.[94] As Moore suggests,

> "A first offender can plausibly argue that an offense was an anomaly, a lone departure from past standards of behavior. The act should not really be attributed to him, the offender can argue, because it was not "in character." After the first offense, however, this claim lacks credibility. Repetition has the effect of "endorsing" the earlier offense. It becomes safe to conclude that subsequent offenses are genuinely a product of the

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89 Gruner, *Just Punishment*, *supra* note 63 at 251.

90 *Ibid.* at pp. 251-252.

91 A possible and immediate solution to the weakness of the Guidelines is, therefore, to include the number of victims and the degree of non-pecuniary harms suffered by them in determining the base fine, in particular, in cases of corporate manslaughter.

92 *Supra* text accompanying note 73.

93 The involvement of high managerial officials in the offence and the size of the company, both of which are the other aggravating factors for the organisational sentencing, will be discussed in the next subsection.

94 Chapter 4 of the Guidelines provides detailed provisions of criminal history category for individual offenders.

offender's character."[95]

This reasoning is of course true of corporate or organisational offenders. The recurrence of the same misconduct by corporate employees suggests that a corporation has failed adequately to respond to the first offence by changing its crime-preventive systems and by disciplining the offenders internally. It may also imply that the repetition of the misconduct as well as the first offence have been ignored or endorsed within the corporate structure. Accordingly, it cannot claim that the offence at issue was committed outside the scope of the offender's employment.[96]

Similarly, the Guidelines' inclusion of the corporation's willful obstruction of justice during the investigation, prosecution or sentencing of the instant offence in assessing corporate culpability is also reasonable. This aggravating factor should be best understood in conjunction with a mitigating factor of its self-reporting, cooperation and acceptance of responsibility under the Guidelines.[97] The corporation's obstruction of justice by concealing an offence or by protecting an employee who has violated the law suggests that it is the corporation's intent to endorse or encourage the offence; "an organization with a "good" character would likely have disciplined or fired the offending employees."[98]

The Guidelines allow the court to subtract as many as five points from the culpability score in cases of the corporation's full self-reporting of the offence to the authorities concerned, full cooperation with them and affirmative acceptance of responsibility.[99] The meaning of "cooperation" is explained by the Guidelines as

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95 Moore, *supra* note 63 at 788.

96 In cases of corporate manslaughter, as mentioned in Chapter 5 (n.93), the fact that similar incidents occurred in the past (as found in the P & O case) and the issue of notification by the court or law enforcement agency that the relevant corporate risk-averting systems need to be improved should be included in prior history not only in determining the corporation's awareness of the risk at the pre-conviction stage, but also in assessing its culpability at the post-conviction stage.

97 *Guidelines*, *supra* note 63, §8C2.5.(g), referred to in Moore, *supra* note 63 at 789.

98 Moore, *supra* note 63 at 790. Moore goes on to say that "Eliminating a criminal employee from the organizational decision-making process improves the corporate character and represents an important step in the reform of the organization." *Ibid.*

99 *Guidelines*, *supra* note 63, §8C2.5.(g), referred to in *supra* text accompanying note 77.

follows:

> "To be thorough, the cooperation should include the disclosure of all pertinent information known by the organization. A prime test of whether the organization has disclosed all pertinent information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct. However, the cooperation to be measured is the cooperation of the organization itself, not the cooperation of individuals within the organization. If, because of the lack of cooperation of particular individual(s), neither the organization nor law enforcement personnel are able to identify the culpable individual(s) within the organization despite the organization's efforts to cooperate fully, the organization will still be given credit for full cooperation."[100]

The adoption of this mitigating factor seems to be aimed at lowering law enforcement costs and increasing the likelihood of conviction, but it is believed that it actually encourages the corporation to uncover violations by agents and to "express remorse, contrition and renunciation of the crime."[101]

6.4.3. Compliance Programs

Under the Guidelines, the corporation's culpability score is reduced by three points "[i]f the offense occurred despite an effective program to prevent and detect violations of law."[102] An "effective program to prevent and detect violations of law," sometimes called a "compliance program," is defined by the Guidelines as "a program that has been reasonably designed, implemented, and enforced so that it generally will be effective in preventing and detecting criminal conduct."[103] The Guidelines emphasise that failure to prevent or detect a certain offence is not, by itself, evidence that the corporate compliance program is ineffective. Instead, the "hallmark" of an effective program is that the corporation exercises due diligence in seeking to prevent and detect criminal conduct by its employees and agents.[104] The corporation's due diligence, according to

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100 *Guidelines*, *ibid.*, §8C2.5., Commentary, Application Notes (12).

101 Moore, *supra* note 63 at 790.

102 *Guidelines*, *supra* note 63, §8C2.5.(f), referred to in *supra* text accompanying note 77.

103 *Guidelines*, *supra* note 63, §8A1.2., Commentary, Application Notes 3(k).

104 *Ibid.* However, the mitigation credit for the adoption of a compliance program does not apply: (1) when an individual within "high-level personnel" or an individual responsible for administrating and enforcing a compliance program was involved in the offence; or (2) if, after becoming aware of an offence, a corporation unreasonably delayed reporting it to the government."

the Guidelines, requires "at a minimum" that the corporation take the following types of steps:

> "(1) The organization must have established compliance standards and procedures to be followed by its employees and other agents that are reasonably capable of reducing the prospect of criminal conduct.
>
> (2) Specific individual(s) within high-level personnel of the organization must have been assigned overall responsibility to oversee compliance with such standards and procedures.
>
> (3) The organization must have used due care not to delegate substantial discretionary authority to individuals whom the organization knew, or should have known through the exercise of due diligence, had a propensity to engage in illegal activities.
>
> (4) The organization must have taken steps to communicate effectively its standards and procedures to all employees and other agents, *e.g.*, by requiring participation in training programs or by disseminating publications that explain in a particular manner what is required.
>
> (5) The organization must have taken reasonable steps to achieve compliance with its standards, *e.g.*, by utilizing monitoring and auditing systems reasonably designed to detect criminal conduct by its employees and other agents and by having in place and publicizing a reporting system whereby employees and other agents could report criminal conduct by others within the organization without fear of retribution.
>
> (6) The standards must have been consistently enforced through appropriate disciplinary mechanisms, including, as appropriate, discipline of individuals responsible for the failure to detect an offense. Adequate discipline of individuals responsible for an offence is a necessary component of enforcement: however, the form of discipline that will be appropriate will be case specific.
>
> (7) After an offense has been detected, the organization must have taken all reasonable steps to respond appropriately to the offense and to prevent further similar offenses - including any necessary modifications to its program to prevent and detect violations of law."[105]

Three additional points are noted by the Guidelines, concerning the necessary actions that should be taken by the corporation for effective compliance programs described above. Firstly, the requisite degree of formality of a compliance program will vary with the size of the corporation; namely, "the larger the organization, the more formal the program typically should be."[106] Secondly, a corporation is expected to pay special attention to the occurrence of the particular offences which, because of the nature of its

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In addition, the involvement of "substantial authority personnel" creates a rebuttable presumption that the corporation lacked an effective program. *Ibid.*, §8C2.5.(f).

105 *Ibid.*, §8A1.2., Commentary, Application Notes 3(k).

106 *Ibid.* The Guidelines go on to say that "[a] larger organization generally should have established written policies defining the standards and procedures to be followed by its employees and agents."

business, is very likely. For example,

> "if an organization handles toxic substances, it must have established standards and procedures designed to ensure that those substances are properly handled at all times. If an organization employs sales personnel who have flexibility in setting prices, it must have established standards and procedures designed to prevent and detect price-fixing. If an organization employs sales personnel who have flexibility to represent the material characteristics of a product, it must have established standards and procedures designed to prevent fraud."[107]

Thirdly, a corporation's prior history is used to determine what types of offences need to be anticipated and prevented, and recurrence of similar misconduct "casts doubt on whether it took all reasonable steps to prevent such misconduct."[108]

Moore evaluates the adoption of a compliance program as mitigating credit in determining the corporation's culpability score under the Guidelines as "the most innovative and controversial element."[109] "The most controversial" may be correct whilst "the most innovative" may not. On closer examination, the content of the necessary steps for a compliance program is far from novel; while steps (1)-(3) described above merely enumerate general requirements that a corporation adopt an effective compliance program, steps (4)-(7) are concerned with how it exercises due diligence and what types of preventive and corrective measures it should take against the occurrence of offences by its employees. Neither is it an innovative idea that the mitigation credit for a compliance program is inapplicable if "high-level" or "substantial authority" personnel of the corporation are involved in the offence, because such personnel are most likely to be responsible for establishing the relevant preventive or corrective systems against violations of law.

The adoption of a compliance program as a mitigating factor under the Guidelines is controversial because of two flaws from which the Guidelines suffer. The first is that the content of necessary steps for a corporation to enforce an effective compliance program is concerned with corporate liability, rather than corporate sentencing. The Guidelines appear to offer the corporation an opportunity to rebut the

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107 *Ibid.*

108 *Ibid.*, referred to in *supra* note 96.

109 Moore, *supra* note 63 at 791.

assumption that an offence committed by its employee(s) was encouraged by corporate policies. To do so, the corporation must show that offence occurred "despite an effective program to prevent and detect violations of law."[110] If the corporation succeeds in rebutting the assumption, three points are subtracted from its culpability score, although it is still held liable for the offence by its employee(s) which, despite its efforts, the corporation failed to prevent from occurring. This is akin to imposing strict liability on corporations.[111] Thus, when applied to cases of corporate manslaughter in English law, the Guidelines would causes some practical problems. That is, irrespective of whether or not a corporation is blamed for its reckless or grossly careless risk-averting systems which caused the death of the victim, the presence or the absence of the compliance program is uniformly considered to be a mitigating or aggravating factor at sentencing, so that such a consideration fails properly to reflect the corporation's requisite mental states. Moreover, no matter how diligently the corporation made all-out efforts to prevent and detect violations of law by its employees, it is held liable in any event just as in the case of strict liability and its efforts are only considered in determining the degree of culpability at the post-conviction stage. As discussed in Section 6.2. of this chapter, the corporation's adoption of an effective compliance program or effort to prevent the occurrence of the offence by its employees should be considered in terms of causation, foreseeability or avoidability in order to determine whether it is liable, and not to what extent it should be blamed.

The second flaw concerning the content of the Guidelines' adoption of a compliance program as a mitigating factor is related to the requisite degree of formality of a compliance program according to the size of the organisation based on its number of employees. The Guidelines give larger organisations more aggravating points and smaller organisations fewer points in determining their culpability score.[112] They particularly do so in cases where high-level officials participate in the offence, believing

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110 *Guidelines*, *supra* note 63, §8C2.5.(f), cited in *supra* text accompanying notes note 77 and 102.

111 This is not surprising since the vicarious liability doctrine has been widely accepted in the US case law.

112 *Supra* note 106. See also *supra* note 76 (the number of employees the corporation had as one of aggravating factors for the culpability score).

that the size of the organisation is interrelated to the degree of its culpability. The following three reasons are given by the Guidelines for the increased culpability scores in cases of the involvement of high-level officials in the offence:

> "First, an organization is more culpable when individuals who manage the organization or who have substantial discretion in acting for the organization participate in, condone, or are willfully ignorant of criminal conduct. Second, as organizations become larger and their managements become more professional, participation in, condonation of, or willful ignorance of criminal conduct by such management is increasingly a breach of trust or abuse of position. Third, as organizations increase in size, the risk of criminal conduct beyond that reflected in the instant offense also increases whenever management's tolerance of the offense is pervasive. Because of the continuum of sizes of organizations and professionalization of management, subsection (b) [of §8C2.5. Culpability Score] gradually increases the culpability score based upon the size of the organization and the level and extent of the substantial authority personnel involvement."[113]

Obviously, the second reason has little to do with the assessment of corporate culpability. It may be true that the involvement of a large organisation in an offence causes more serious damage than in cases of that of a small organisation's management; but this is about "the seriousness of the offense, not [about] the culpability of the organization."[114] The third reason is more confusing because the opposite may be true. The smaller the size of the corporation, the more closely its high-level personnel are involved in the corporation's day-to-day operations, the more direct influence they exert over subordinates. In a larger corporation, as pointed out in Chapter 3,[115] high-level personnel are more remote from specific corporate operations, their control over subordinate are usually indirect, and the organisational decision-making process is usually more complicated. Therefore, "small firms whose officials tolerate illegal activity may well be more culpable than larger firms."[116]

6.4.4. Additional Aggravating Factors under the Risk-Oriented Theory

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113 *Guidelines*, *supra* note 63, §8C2.5., Commentary, Background. The degree of pervasiveness of management's to tolerance of the offence (that appears in the third reason) depends on "the number, and degree of responsibility, of individuals within substantial authority personnel who participated in, condoned, or were willfully ignorant of the offense. Fewer individuals need to be involved for a finding of pervasiveness if those individuals exercised a relatively high degree of authority." *Ibid.*, §8C2.5., Commentary, Application Notes 4.

114 Moore, *supra* note 63 at 787.

115 Chapter 3, text accompanying notes 57-59.

116 Moore, *supra* note 63 at 787. This observation may be true of the Kite case.

Given the flaws indicated in the previous subsection, the Guidelines may require modification, particularly in cases of corporate manslaughter. That is, in determining the degree of corporate culpability at sentencing, careful account should be taken of the relationship between the type of the risk at issue and the relevant corporate risk-averting systems, rather than of the mere absence or presence of a compliance program or of the company's size. As discussed in the earlier section of this chapter,[117] questions of whether the risk could cheaply be avoided and of whether the danger to the victim posed by the particular corporate operation was disproportionate to the benefit to society may also be of practical use in assessing corporate culpability for manslaughter. Firstly, if it is proved that the risk at issue was cheaply discoverable and avoidable, but the corporation failed to do so, the degree of corporate culpability should be at its highest. Secondly, in cases where the corporation poses a great degree of danger, which might still cost a great deal to avoid, the degree of corporate culpability should be determined by addressing the question of whether the danger posed by the corporation is disproportionate to the benefit to society. If it is proved that the danger exceeded the benefit, then the corporation should be culpable for its failure to avert the risk, though less culpable than in cases in which the risk was cheaply discoverable and avoidable. Thirdly, if it is proved that the danger posed by the corporation was not necessarily disproportionate to the benefit to the society and was very costly to avoid, the corporation should not be blamed for its failure to avert the risk, and a defence of unavoidability of the risk should be granted to escape liability.

Under the risk-oriented theory advanced in the previous chapter, the first and second cases mentioned above can be further subdivided according to the type of the requisite corporate *mens rea*, in order more accurately to determine the degree of corporate culpability. In both cases, the corporation's failure to discover the risk may stem from its failure to employ competent staff (collection errors), to establish the communication system between management and employees (transaction errors), or to acknowledge the existence of the risk through its top management (judgment errors) whilst the corporation's failure to avoid the risk may result from its failure to estimate

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117 See Section 6.2., in particular, Subsection 6.2.3.

the risk properly or the existing risk-averting systems (assessment errors). Usually, the offence of reckless manslaughter is regarded as more serious than that of manslaughter by gross negligence (or carelessness),[118] so that, in both cases, corporate reckless manslaughter based on assessment errors should similarly be regarded as a more culpable offence than corporate manslaughter by gross carelessness based on collection, transaction and/or judgment errors.

Given that the risk is cheaply avoidable in the first case, the corporation's failure to avert the risk due to its assessment errors should be regarded as blameworthy. Corporate conduct should also be viewed as culpable when the corporation foresaw but failed to avert the risk which was disproportionate to the benefit received from society through the relevant corporate activity. Nevertheless, the first case obviously illustrates more culpable corporate conduct than that in the second case, mainly because of the easiness of discovering the risk. In addition, the degree of corporate culpability in cases of corporate manslaughter by gross carelessness may be further subdivided. If the corporation made all errors, namely, collection, transaction and judgment errors, and it is proved that such errors are all causally linked to the prohibited result, the corporation should be blamed more severely than in cases in which it made one or two of them.

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118 See, for example, Law Commission, *Involuntary Manslaughter*, *supra* note 1, para. 5.47.

CHAPTER 7

SUMMARY, CONCLUSIONS AND PERSPECTIVES

One commentator argued in 1984 that "Corporations don't commit crimes. People do.... The theoretical underpinnings of corporate liability are underdeveloped.... Without a rationale that is internally consistent and in alignment with the criminal law generally and the elements of the crime, there can be no justification for corporate criminal liability."[1] More than fifteen years later, there are enough theoretical underpinnings and rationales that can generally be consistent with the criminal law and the elements of the offence of manslaughter in order for corporations to be held liable for their risk-producing activities. The public's increasing attention to disasters and fatal accidents caused by corporate activities, coupled with the Law Commission's recent proposals for legislating offences of involuntary manslaughter,[2] "make this an ideal time to re-examine the law and methods by which corporations are held criminally liable"[3] for manslaughter.

In this thesis, "the law and methods by which corporations are held liable" for manslaughter were re-examined. A survey of the historical development of corporate criminal liability in English law revealed that English courts originally held corporations liable with resort to two parallel liability models: an individual master's vicarious liability for his servants' tort and the liability of "quasi-municipal" corporations to maintain and repair the public facility. Whilst a corporation is still considered fictitious and, thus, incapable of criminal conduct and mental states of its own, its criminal liability had long been viewed as comparable with that of individual offenders.

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1 N. Parisi, "Theories of Corporate Criminal Liability" in E. Hochstedler (ed.), *Corporations as Criminals* (1984, Sage Publications, Beverly Hills), pp. 63-64. See also G.O.W. Mueller, "Mens Rea and the Corporation: A Study of the Model Penal Code Position on Corporate Criminal Liability" (1957) 19 *University of Pittsburgh Law Review* 21 at 23 (suggesting that "While the law of corporate criminal liability is easy to understand or, for any given jurisdiction, easy to ascertain, the rationale of corporate criminal liability is all but clear. It is safe to say that, for the most part, the law has proceeded without rationale wtahsoever - particularly in the area of regulatory and absolute liability offenses. It simply rests on an assumption that such liability is a necessary and useful thing.").

2 Law Commission No.237, *Legislating the Criminal Code: Involuntary Manslaughter* (1996, HMSO, London).

3 W.S. Laufer, "Corporate Bodies and Guilty Minds" (1994) 43 *Emory Law Journal* 647 at 730.

Nevertheless, the doctrines of corporate liability utilised by courts (namely, the doctrine of vicarious liability and the identification principle) are far from comparable with those of individual liability in criminal law. This is particularly so in cases of manslaughter. Under English law, an individual defendant is not held vicariously liable in cases in which his/her employees commit an offence of manslaughter within their scope of employment on his/her behalf. Neither is s/he liable when his/her "*alter ego*" is involved in criminal conduct which causes the death of a victim. Added to this, these anthropomorphic approaches suffer from practical flaws: in cases where a culpable individual offender cannot be identified in the corporate hierarchy, there is no corporate criminal liability. This is because the liability of a corporation under these models is derived from that of the actual offender.

In attempting to modify the derivative nature of corporate liability, courts and commentators have invented alternative theories under which a corporation can be held liable even when the requisite conduct and *mens rea* of the particular individuals cannot be proved. The collective knowledge doctrine, for example, enables a corporation to incur liability by aggregating innocent minds of several corporate employees. By emphasising such unique features of corporations as cultures, policies, practices and procedures that govern corporate employees' conduct, several organisation theories have attempted to identify a corporation's fault of its own. However, these alternative theories prove unsuccessful in reconciling the concept of corporate fault with traditional criminal law principles due to the operational and conceptual flaws from which they suffer. Most of these theories fail properly to capture corporate fault both at the pre- and at the post-conviction stages. Moreover, under these theories it is difficult to distinguish between corporate intent, recklessness and negligence mainly because corporate policies or cultures forming the basis of the concept of corporate fault cannot tell, in most cases, what result a corporation intended, was reckless or negligent about at the material time of the occurrence of an offence.

The main reason why the existing theories of corporate liability suffer from various types of flaws lies in the fact that only few attempts have so far been made to advance a model of corporate liability for a *particular* offence. The doctrine of vicarious liability and the identification principle have uniformly been applied by courts

to cases in which corporations were held liable for numerous types of offences. In addressing the question of how to capture genuine corporate fault, organisation theorists have argued that their models of corporate liability can generally be incorporated into the existing statutes that impose liability on corporations for a variety of offences.[4] Nevertheless, the nature of corporate conduct and mental states under these theories usually fail to be flexible according to the type of offence for which a corporation is to be held liable. This is an unfortunate oversight by courts and commentators because, in cases of individual offenders, most of them acknowledge that the type and nature of the requisite conduct and mental states vary from offence to offence in English criminal law.[5] It was for this reason that this thesis formulated a new model of corporate liability applicable *only* to corporate manslaughter.

Under the Law Commission's proposals, an individual offender is to be held liable for manslaughter when, despite his/her awareness of a risk that his/her conduct will cause the death, s/he unreasonably takes that risk in the circumstances as s/he knows or believes them to be (reckless manslaughter), or when, despite the obviousness of the risk to a reasonable person in his/her position and his/her capacity for appreciating the risk at the material time, s/he takes the risk and such risk-taking conduct falls below what can reasonably be expected of him/her in the circumstances (manslaughter by gross carelessness).[6] The central issue was how a corporation can be held liable for manslaughter under the same conditions described above. Under the risk-oriented

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4 See, for example, W.S. Laufer, "Corporate Bodies and Guilty Minds" (1994) 43 *Emory Law Journal* 648 at 694 (addressing a question of how models of corporate fault should be defined in the American Model Penal Code's hierarchy of mental states); B. Fisse, "The Attribution of Criminal Liability to Corporations: A Statutory Model" (1991) 13 *Sydney Law Review* 277 at 280 (providing a statutory model of corporate reactive fault for "[a] provision of the Law of the Commonwealth relating to indictable offences or summary offences").

5 See, for example, R. Card, *Card, Cross and Jones Criminal Law* (1998, 14th ed., Butterworths, London), pp. 34 ("Of course, the nature of the requisite act varies from offence to offence.") and 44 ("The expression mens rea refers to the state of mind expressly or impliedly required by the definition of the offence charged. This varies from offence to offence...."); A. Ashworth, *Principles of Criminal Law* (1995, 2nd ed., Clarendon Press, Oxford), pp. 103 ("we must make the point that not all criminal offences are formulated so as to require proof of a particular *type* of act) and 151 ("It should not be assumed that there is a single fault requirement for each offence....").

6 Law Commission, *supra* note 2, "Draft of a Bill to create new offences of reckless killing, killing by gross carelessness and corporate killing to replace the offence of manslaughter in cases where death is caused without the intention to causing death or serious injury," Sections 1-2.

theory, the requisite conduct and fault elements on the part of a corporation are, as in cases of individual offenders, determined by the concept of risk which plays a central role in offences of manslaughter. By regarding any corporate personnel's actions as part of the relevant corporate risk-relating systems, the risk-oriented theory can hold a corporation liable for its own conduct that causes the prohibited result, even when no culpable individuals are found. Secondly, corporate recklessness and gross carelessness which are necessary for the offences of manslaughter can be found by reference to the type of errors made in the relevant corporate risk-averting systems. In cases in which competent staff are not employed in relation to risk-involving operations (collection errors), liaison between employees and management is not properly established (transaction errors) or top management improperly rule the existence of the risk out, a corporation is to be held liable for manslaughter by gross carelessness. In cases in which top management fail to make proper assessments on the causal link between the existing risk in the particular corporate operations and the possible result, it is to be held liable for reckless manslaughter.

The risk-oriented theory also provides firm guidance as to the situations in which a corporate defendant should be granted a defence, and as to the aggravating and mitigating factors that affect the severity of corporate sentences. In relation to corporate defences, three situations were described by this thesis, in which corporations should escape liability for manslaughter: in cases where it is proved that a causal link is broken between corporate risk-relating systems and the prohibited result; in cases where the risk at issue is not foreseeable to the corporation; and in cases where the risk is not avoidable. As for sentencing factors, it was found that factors such as the size of a corporation, the involvement of high managerial personnel in the offence, prior criminal history and obstruction of justice have been considered under the US Organizational Sentencing Guidelines to be aggravating factors while the existence of an effective compliance program and cooperation with authorities have been viewed as mitigating factors. By examining the feasibility of each aggravating and mitigating factor in cases of corporate manslaughter, additional sentencing factors were provided, such as whether the risk was easily discoverable, whether the danger posed by the corporation was disproportionate to the benefit to society, and what and how many types of errors it

made in relation to its relevant risk-averting systems.

As noted in Chapter 1,[7] increasing demands for corporate criminal liability for causing public disasters have emerged in the last decades, and it is difficult to imagine that these demands will diminish in the future as long as our health, environment and lives are exposed to danger through processes and conditions of transportation, construction, production and sales of goods, working places and public services, all of which are dominated by corporations in modern society. It is hoped that this thesis successfully demonstrates that criminal law can be used to deter unreasonably risk-producing activities by corporations. However, given the scale of casualties and damage caused through illegal corporate activities, further studies of corporate crime and liability should be encouraged.

It is conceivable that future studies on the issue of corporate criminal liability will be made from a number of different perspectives. In relation to the issue of corporate manslaughter, two different approaches need to be taken: one from comparative perspectives; and the other from statutory perspectives. As mentioned in Chapter 2,[8] whether or not a corporation can be held liable for manslaughter in criminal law is still the subject of much debate in a number of civil law jurisdictions. In those jurisdictions in which corporate criminal liability is not widely accepted, there are instead advanced legal systems that hold individuals criminally liable for corporate crime and impose administrative and civil sanctions against corporate entities.[9] Whether these systems are, as compared to common law approaches of using criminal law against corporations, sufficiently effective to deter corporate risk-producing or life-endangering activities needs to be carefully examined. Given that the more widespread and internationalised corporate activities become, the less regard they pay to the differences in legal regimes, a greater understanding of the operation of two different legal traditions in this area should be encouraged. Although only a few references were made to a

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7 Chapter 1, text accompanying notes 1-3.

8 Chapter 2, text accompanying notes 1-5.

9 See, in general, H.D. Doelder & K. Tiedemann (eds.), *La Criminalisation du Comportement Collectif* (Criminal Liability of Corporations) (1996, Kluwer Law International, The Hague); Council of Europe, *Liability of Enterprises for Offences* (1990, Recommendation No. R (88) 18, Strasbourg), Explanatory Memorandum.

theoretical comparison of some principles of criminal law in both jurisdictions,[10] clearer analysis of structures of German offences such as *Unterlassungsdelikte* (crimes of omission) or *Fahrläßigkeitsdelikte* (crimes of recklessness or negligence) and German concepts such as *Tatbestand* (statutory definitions of crime), *Rechtwidrigkeit* (illegality) and *Schuld* (culpability) may contribute to comparative solutions between German (including Austrian, Swiss, Japanese and South Korean) and common law jurisdictions.

In addition, as referred to in Chapter 3,[11] it is argued that there are three ways by which corporations can cause harm: (1) by creating occupational harm to the workers; (2) by selling the defective goods and services to consumers and customers; and (3) by deteriorating the environment affecting the general public. Although this thesis specifically examined several cases of corporate manslaughter so as to formulate the new model of corporate liability, it would be more effective to characterise each case according to these three categories. The major benefit that can be obtained from this method is that it is easier to coordinate corporate liability models under relevant statutes such as the Environmental Protection Act 1990, Consumer Protection Act 1987 or Health and Safety at Work etc Act 1974 (in cases of English law).[12] Since these statutes provide legal duties in relation to corporate risk-averting operations,[13] it would be more practical to refer to them in order to delineate the area in which corporations are subject to legal duties and to consider what type of conduct is required for corporations to undertake to avoid liability in specific situations.

Moreover, field studies relevant to the issue of *general* corporate liability may provide valuable statistical data with which to determine what type of company has the

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10 See, for example, Chapter 4, n.93; Chapter 5, n.58.

11 Chapter 3, text accompanying note 24.

12 For detailed arguments of corporate liability according to these three categories, see, for example, N.K. Frank & M.J. Lynch, *Corporate Crime, Corporate Violence - A Primer* (1992, Harrow and Heston, New York); S.L. Hills (ed), *Corporate Violence - Injuries and Death for Profit* (1987, Rowman & Littlefield Publishing, Inc., Maryland). In relation to occupational hazards and workplace injuries under the Health and Safety at Work etc Act 1974, see, for example, D. Bergman, *Deaths at Work - Accidents or Corporate Crime* (1991, WEA, London); *The Perfect Crime? - How Companies Escape Manslaughter Prosecutions* (1994, HASAC, London).

13 See Chapter 5, text accompanying notes 106-109.

tendency to engage in illegal activities or what type of crime is likely to be undertaken.[14] Furthermore, the sociological and criminological inquiry into the status of corporate crime or illegality and the use of criminal sanctions may provide certain guidance as to how to control corporate crime effectively in the general sense. As far as corporate criminal sanctions are concerned, several options have been suggested by commentators, such as equity fines, corporate probation, adverse publicity, restitution, community service, suspension of particular corporate business, and corporate dissolution.[15] Nevertheless, these sanctions are "all options as yet untested in" "the criminal justice system of imagination or commitment to overcome the limitations of financial penalties" (namely, fall-out or spill-over effects on a number of innocent individuals)."[16] An issue of which sanctions to be adopted should be carefully treated in the future.

Finally, further attempts (especially comparative ones) should be made to formulate appropriate models of corporate liability for other types of offences such as business or economic crime.[17] This thesis was only concerned with offences of manslaughter. However, if the conception of corporate criminal liability becomes more "entrenched in the public mind"[18] both in common law and in civil law jurisdictions in the future, the next step to be taken may be to depart from the ineffective or "imperfect"[19] identification principle and to seek for more workable, flexible approaches suitable for corporate liability for specific offences. It will be desirable in the future to develop the issue of corporate criminal liability from the perspective of dealing particularly with offences which have transnational implications and may involve different traditions.

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14 On this subject, see, for example, J. Braithwaite, *Corporate Crime in the Pharmaceutical Industry* (1984, Routledge & Kegan Paul, Boston); F. Pearce & S. Tombs, *Toxic Capitalism: Corporate Crime and the Chemical Industry* (1998, Ashgate, Hants).

15 On this theme, see Chapter 6, n.70.

16 C. Wells, *Corporations and Criminal Responsibility* (1993, Clarendon Press, Oxford), p. 147.

17 For a comparative study on the European status of economic crime, see, for example, L.H. Leigh (ed.), *Economic Crime in Europe* (1980, The Macmillan Press, London).

18 Card, *supra* note 5 at para. 21.59.

19 *Ibid.*

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